

16D C.J.S. Constitutional Law VIII XXII M Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

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Research References

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- A.L.R. Index, Constitutional Law
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- A.L.R. Index, Rent Control

West's A.L.R. Digest, [Constitutional Law](#)  4082, 4264, 4267, 4361 to 4368, 4370 to 4372, 4374

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16D C.J.S. Constitutional Law § 2283

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2283. Lawfulness of reasonable regulation of prices, charges, and rates

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4082, 4264, 4267

Governmental regulation of prices, charges, or rates is lawful and not offensive to constitutional requirements of due process of law if it is substantially related to a legitimate end sought to be attained, and the test of the validity of such regulation is its reasonableness.

Price control is one of the means available to the states and to Congress in their respective domains for the protection and promotion of the welfare of the economy,¹ and, as a general rule, governmental regulation of prices, charges, or rates is lawful and not offensive to the constitutional requirements of due process if it is substantially related to a legitimate end sought to be attained.² In this regard, the government's intervention in the marketplace to regulate rates or prices that are artificially inflated as the result of a monopoly or near monopoly does not violate the Due Process Clause.³ Accordingly, price and rate regulation has withstood challenges on due process grounds where it has been enacted by legislatures⁴ or promulgated as a result of a delegation of power to an administrative officer or commission,⁵ even where it has superseded prices and rates previously fixed by contract.⁶ While the right of an owner of property to fix the price at which he or she will sell it is an inherent attribute of the property itself, safeguarded by the Due Process Clauses of the Fifth and Fourteenth Amendments, such provisions, generally,

simply protect an individual or business from price regulation which is arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt.⁷

Price fixing is gauged by the same standard as other regulation in the exercise of governmental powers, namely, the standard of reasonableness.⁸ Accordingly, constitutional due process guarantees are not violated by the regulation of prices, rates, and charges, which are reasonable,⁹ nondiscriminatory,¹⁰ and promulgated in the proper exercise of the police power, or for the general welfare,¹¹ safety, and morals,¹² or where a private business, or private property, is affected with a public interest.¹³ The private character of a business does not necessarily exempt it from the regulation of prices by the state,¹⁴ and, moreover, it may be competent for the legislature to fix minimum prices for commodities and services regardless of whether the particular business is one affected with a public interest.¹⁵ For example, rents prices may be controlled where to do so does not violate substantive due process.¹⁶

The regulation of the prices of a particular business cannot be justified solely in the interest of the business regulated since the public has a vital interest, which if not observed, will render the regulations invalid.¹⁷

The fact that price control may reduce the value of the property regulated does not establish that the regulation is in violation of the constitutional guarantee of due process.¹⁸

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Footnotes

- 1 U.S.—[Sunshine Anthracite Coal Co. v. Adkins](#), 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).
- 2 U.S.—[Cities Service Gas Co. v. Peerless Oil & Gas Co.](#), 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190 (1950); [Guggenheim v. City of Goleta](#), 638 F.3d 1111 (9th Cir. 2010).
- 3 Md.—[Tyler v. City of College Park](#), 415 Md. 475, 3 A.3d 421 (2010).
- 4 N.C.—[State ex rel. Utilities Commission v. Edmisten](#), 294 N.C. 598, 242 S.E.2d 862 (1978).
- 5 U.S.—[Pennell v. City of San Jose](#), 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988).
- 6 U.S.—[Bowles v. Willingham](#), 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).
- 7 Ark.—[Gipson v. Morley](#), 217 Ark. 560, 233 S.W.2d 79 (1950).
- 8 Conn.—[Schwartz v. Kelly](#), 140 Conn. 176, 99 A.2d 89 (1953).
- 9 U.S.—[Colony Cove Properties, LLC v. City Of Carson](#), 640 F.3d 948 (9th Cir. 2011); [Publix Cleaners v. Florida Dry Cleaning and Laundry Bd.](#), 32 F. Supp. 31 (S.D. Fla. 1940).
- 10 Cal.—[City of Los Angeles v. Public Utilities Com.](#), 15 Cal. 3d 680, 125 Cal. Rptr. 779, 542 P.2d 1371 (1975).
- 11 Fla.—[Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.](#), 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).
- 12 U.S.—[Mora v. Torres](#), 113 F. Supp. 309 (D.P.R. 1953), judgment aff'd, 206 F.2d 377 (1st Cir. 1953).
- 13 Okla.—[Southern Union Gas Co. v. Texas County Irrigation & Water Resources Ass'n, Inc.](#), 1977 OK 73, 564 P.2d 1004 (Okla. 1977).
- 14 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
- 15 Fla.—[Robinson v. Florida Dry Cleaning & Laundry Bd.](#), 141 Fla. 899, 194 So. 269 (1940).
- 16 U.S.—[Wallace v. Hudson-Duncan & Co.](#), 98 F.2d 985 (C.C.A. 9th Cir. 1938).
- 17 Cal.—[Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.](#), 11 Cal. 2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938).
- 18 S.D.—[In re Northwestern Bell Telephone Co.](#), 73 S.D. 370, 43 N.W.2d 553 (1950).

Balance of interests

To comport with due process, rent regulation must not prevent an efficient enterprise from operating successfully, but rent regulators are permitted to adjust prices within a broad zone of reasonableness, balancing the interests of landlords and tenants.

Cal.—[TG Oceanside, L.P. v. City of Oceanside](#), 156 Cal. App. 4th 1355, 68 Cal. Rptr. 3d 320 (4th Dist. 2007), as modified on denial of reh'g, (Nov. 16, 2007).

9 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

Ariz.—[State v. Walgreen Drug Co.](#), 57 Ariz. 308, 113 P.2d 650 (1941).

Fla.—[Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.](#), 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).

Ill.—[Midwest Petroleum Marketers Ass'n v. City of Chicago](#), 82 Ill. App. 3d 494, 37 Ill. Dec. 707, 402 N.E.2d 709 (1st Dist. 1980).

Ind.—[Department of Financial Institutions v. Holt](#), 231 Ind. 293, 108 N.E.2d 629 (1952).

Neb.—[Nelsen v. Tilley](#), 137 Neb. 327, 289 N.W. 388, 126 A.L.R. 729 (1939).

N.J.—[Duff v. Trenton Beverage Co.](#), 4 N.J. 595, 73 A.2d 578 (1950).

10 U.S.—[Portland Ry., Light & Power Co. v. Railroad Commission of Oregon](#), 229 U.S. 397, 33 S. Ct. 820, 57 L. Ed. 1248 (1913).

11 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); [Publix Cleaners v. Florida Dry Cleaning and Laundry Bd.](#), 32 F. Supp. 31 (S.D. Fla. 1940).

Md.—[Westchester West No. 2 Ltd. Partnership v. Montgomery County](#), 276 Md. 448, 348 A.2d 856 (1975).

Minn.—[Twin City Candy & Tobacco Co. v. A. Weisman Co.](#), 276 Minn. 225, 149 N.W.2d 698 (1967).

N.H.—[In re Opinion of the Justices](#), 88 N.H. 497, 190 A. 713 (1937).

12 Md.—[Westchester West No. 2 Ltd. Partnership v. Montgomery County](#), 276 Md. 448, 348 A.2d 856 (1975).

13 U.S.—[Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

N.H.—[In re Opinion of the Justices](#), 88 N.H. 497, 190 A. 713 (1937).

14 U.S.—[Publix Cleaners v. Florida Dry Cleaning and Laundry Bd.](#), 32 F. Supp. 31 (S.D. Fla. 1940).

15 Ky.—[Moore v. Northern Kentucky Independent Food Dealers Ass'n](#), 286 Ky. 24, 149 S.W.2d 755 (1941).

16 U.S.—[MHC Financing Ltd. Partnership v. City of San Rafael](#), 714 F.3d 1118 (9th Cir. 2013), cert. denied, 134 S. Ct. 900, 187 L. Ed. 2d 776 (2014) (a city's mobile home rent control ordinance was rationally related to the conceivable public purpose of protecting existing tenants).

17 Fla.—[Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.](#), 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).

18 U.S.—[Taylor v. Bowles](#), 147 F.2d 824 (C.C.A. 9th Cir. 1945).

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2284. Lawfulness of reasonable regulation of prices, charges, and rates—When due process is violated

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  4082, 4264, 4267

Price regulations are violative of due process guarantees where they are arbitrary or discriminatory or demonstrably irrelevant to the policy of the legislature.

Price regulations are violative of due process guarantees where they are arbitrary or discriminatory or demonstrably irrelevant to the policy of the legislature,¹ as where a rent control enactment requires rents to conform to an arbitrary standard,² or contains provisions which are not reasonably related to the prevention of excessive rents,³ or where a statute prohibits a person or business organization from selling like goods at lower prices in one part of the state than in another,⁴ or from selling goods at less than cost.⁵ When considering whether a price regulation violates due process, a court must determine whether the regulation may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection for the heart of relevant public interests, both existing and foreseeable.⁶

A statute purporting to make unreasonable charges unlawful does not satisfy constitutional requirements as to due process where it furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated.⁷ Moreover, where the regulation of prices, rates, or charges is not authorized as a police or general welfare measure, or where the property or business involved is not affected with a public interest, due process guarantees are transgressed by the fixing of prices at which property or services may be sold.⁸

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Footnotes

1 U.S.—[Fairmont Creamery Co. v. State of Minn.](#), 274 U.S. 1, 47 S. Ct. 506, 71 L. Ed. 893, 52 A.L.R. 163 (1927); [TCF Nat. Bank v. Bernanke](#), 643 F.3d 1158 (8th Cir. 2011).

Ala.—[Alabama Public Service Commission v. Southern Bell Tel. & Tel. Co.](#), 253 Ala. 1, 42 So. 2d 655 (1949).

Cal.—[State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners](#), 40 Cal. 2d 436, 254 P.2d 29 (1953).

N.J.—[Duff v. Trenton Beverage Co.](#), 4 N.J. 595, 73 A.2d 578 (1950).

Okla.—[Cities Service Gas Co. v. Peerless Oil & Gas Co.](#), 1950 OK 4, 203 Okla. 35, 220 P.2d 279 (1950), judgment aff'd, 340 U.S. 190, 71 S. Ct. 221, 95 L. Ed. 204 (1950) and judgment aff'd, 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190 (1950).

Allegations sufficient to plead due process claim

A national trade association for automobile manufacturers' challenge of the rationality of the relationship between the parts and labor reimbursement provisions and the public welfare of Florida statutes regulating the relationship between motor vehicle manufacturers and dealers was sufficient to plead a due process claim under Florida's Constitution, where the association alleged that the provisions interfered with association members' fundamental right to negotiate reimbursement rates, while bearing no rational relation to the public health, safety, or general welfare.

U.S.—[Alliance of Auto. Mfrs., Inc. v. Jones](#), 897 F. Supp. 2d 1241 (N.D. Fla. 2012).

2 Tex.—[Culberson v. Ashford](#), 118 Tex. 491, 18 S.W.2d 585 (1929).

3 Cal.—[Birkenfeld v. City of Berkeley](#), 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976).

As to the right to a fair return, see § 2286.

4 U.S.—[Great Atlantic & Pac. Tea Co. v. Ervin](#), 23 F. Supp. 70 (D. Minn. 1938).

S.C.—[State v. Standard Oil Co. of N. J.](#), 195 S.C. 267, 10 S.E.2d 778 (1940).

5 Md.—[Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.](#), 178 Md. 38, 12 A.2d 201 (1940).

6 Cal.—[TG Oceanside, L.P. v. City of Oceanside](#), 156 Cal. App. 4th 1355, 68 Cal. Rptr. 3d 320 (4th Dist. 2007), as modified on denial of reh'g, (Nov. 16, 2007).

7 U.S.—[Detroit Creamery Co. v. Kinnane](#), 264 F. 845 (E.D. Mich. 1920), aff'd, 255 U.S. 102, 41 S. Ct. 304, 65 L. Ed. 531 (1921).

Price-gouging statute not impermissibly vague

A price-gouging statute, which prohibited raising prices after the declaration of a state of emergency absent justification and which provided that the baseline price was whatever was being charged in the same market area at or immediately before the state of emergency, was not, on its face, impermissibly vague and thus did not violate the Due Process Clause, where "at" meant on or near the time of, "before" meant earlier, and "market area" would have been clear to any businessperson who wanted to charge competitive prices and attract customers.

Miss.—[State ex rel. Hood v. Louisville Tire Center, Inc.](#), 55 So. 3d 1068 (Miss. 2011).

8 U.S.—[A.M. Holter Hardware Co. v. Boyle](#), 263 F. 134 (D. Mont. 1920).

Ark.—[Union Carbide & Carbon Corp. v. White River Distributors](#), 224 Ark. 558, 275 S.W.2d 455 (1955).

Cal.—[State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners](#), 40 Cal. 2d 436, 254 P.2d 29 (1953).

Fla.—[Scarborough v. Webb's Cut Rate Drug Co.](#), 150 Fla. 754, 8 So. 2d 913 (1942).

Ga.—[Williams v. Hirsch](#), 211 Ga. 534, 87 S.E.2d 70 (1955).

Pa.—[Gambone v. Com.](#), 375 Pa. 547, 101 A.2d 634 (1954).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2285. Lawfulness of reasonable regulation of prices, charges, and rates—Fair trade acts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4267

Prices may be fixed, under legislative leave, by contract between parties without violating constitutional due process guarantees.

Legislation prohibiting the sale of merchandise below cost,¹ or below a specified minimum price,² for the purpose of injuring competitors and destroying competition,³ does not necessarily violate constitutional provisions as to due process. Thus, prices may be fixed, under legislative leave, by contract between the parties without the violation of constitutional due process guarantees,⁴ even where it binds third persons not parties to the contract,⁵ but there is also authority to the contrary.⁶

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Footnotes

¹ Iowa—[May's Drug Stores v. State Tax Commission](#), 242 Iowa 319, 45 N.W.2d 245 (1950).

² U.S.—[General Elec. Co. v. Hess Bros., Inc.](#), 155 F. Supp. 57 (E.D. Pa. 1957).

³ Iowa—[May's Drug Stores v. State Tax Commission](#), 242 Iowa 319, 45 N.W.2d 245 (1950).

4 R.I.—[Avella v. Almac's Inc.](#), 100 R.I. 95, 211 A.2d 665 (1965).
U.S.—[Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.](#), 205 F.2d 788 (5th Cir. 1953).
Md.—[Schill v. Remington Putnam Book Co.](#), 179 Md. 83, 17 A.2d 175 (1941).
5 U.S.—[Old Dearborn Distributing Co. v. Seagram-Distillers Corporation](#), 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936) (construing Illinois law).
Ariz.—[Skaggs Drug Center, Inc. v. U. S. Time Corp.](#), 101 Ariz. 392, 420 P.2d 177 (1966).
Del.—[General Elec. Co. v. Klein](#), 34 Del. Ch. 491, 106 A.2d 206 (1954).
N.Y.—[General Elec Co. v. Masters, Inc.](#), 307 N.Y. 229, 120 N.E.2d 802 (1954).
R.I.—[U. S. Time Corp. v. Ann & Hope Factory Outlet, Inc.](#), 98 R.I. 503, 205 A.2d 125 (1964).
6 Ark.—[Union Carbide & Carbon Corp. v. White River Distributors](#), 224 Ark. 558, 275 S.W.2d 455 (1955).
Ga.—[Cox v. General Elec. Co.](#), 211 Ga. 286, 85 S.E.2d 514 (1955).
Mich.—[Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.](#), 334 Mich. 109, 54 N.W.2d 268 (1952).
Neb.—[McGraw Elec. Co. v. Lewis & Smith Drug Co.](#), 159 Neb. 703, 160 Neb. 319, 68 N.W.2d 608 (1955).
S.D.—[House of Seagram, Inc. v. Assam Drug Co.](#), 85 S.D. 27, 176 N.W.2d 491 (1970).
Wyo.—[Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne](#), 371 P.2d 409 (Wyo. 1962).

16D C.J.S. Constitutional Law § 2286

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2286. Rate or price determination

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4082, 4264, 4361

Price control regulations are generally found to pass constitutional muster under due process so long as they do not become confiscatory; however, under some state constitutions, due process guarantees the right to a fair return.

Price control regulations are generally found to pass constitutional muster under due process so long as they do not become confiscatory.¹ In general, due process does not assure the right under all circumstances to have a return on the value of the property used.² However, under some state constitutions, due process guarantees the right to a fair return.³

The loss of, or failure to, obtain patronage due to competition does not justify the imposition of charges that are unjust to the public,⁴ and orders of administrative bodies fixing minimum prices do not deny due process merely because a particular dealer can show that its effect is to deprive him or her of a profit.⁵

The principle of due process does not require a rate-making body to base its decision as to value on conjectural and unsatisfactory estimates.⁶ The Constitution does not bind rate-making bodies to the service of any single formula, and agencies to whom the

power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments called for by particular circumstances.⁷

Under the due process guaranty, a public utility may not be compelled to absorb its own costs rather than pass them on to the consumers,⁸ but it also may not be allowed to pass on expenses incurred unnecessarily⁹ or for the purpose of expansion.¹⁰

Constitutional due process guarantees are not violated where certain classes of consumers are not charged equally for identical services¹¹ where the classification of the consumers is based on ascertainable standards¹² and bears some rational relationship to a permissible legislative objective.¹³

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Footnotes

1 U.S.—[Michigan Bell Telephone Co. v. Engler](#), 257 F.3d 587, 2001 FED App. 0219P (6th Cir. 2001).
Cal.—[TG Oceanside, L.P. v. City of Oceanside](#), 156 Cal. App. 4th 1355, 68 Cal. Rptr. 3d 320 (4th Dist. 2007), as modified on denial of reh'g, (Nov. 16, 2007).
Utah—[Utah Power & Light Co. v. Public Service Commission](#), 107 Utah 155, 152 P.2d 542 (1944).

Public utility rates
Rates charged by a public utility may be required to be as low as is reasonably consistent with due process requirements.
N.C.—[State ex rel. Utilities Commission v. Edmisten](#), 299 N.C. 432, 263 S.E.2d 583 (1980).
2 U.S.—[Bowles v. Willingham](#), 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944); [Public Service Com'n of Montana v. Great Northern Utilities Co.](#), 289 U.S. 130, 53 S. Ct. 546, 77 L. Ed. 1080 (1933).
Iowa—[Davenport Water Co. v. Iowa State Commerce Commission](#), 190 N.W.2d 583 (Iowa 1971).
Tex.—[United Gas Public Service Co. v. State](#), 89 S.W.2d 1094 (Tex. Civ. App. Austin 1935), writ refused, (Oct. 7, 1936) and judgment aff'd, 303 U.S. 123, 58 S. Ct. 483, 82 L. Ed. 702 (1938).
Utah—[Utah Power & Light Co. v. Public Service Commission](#), 107 Utah 155, 152 P.2d 542 (1944).
Wis.—[Chicago, M., St. P. & P. Ry. Co. v. Public Service Commission](#), 267 Wis. 402, 66 N.W.2d 351 (1954).

No deprivation for extended period of time
A public utility cannot be deprived of a reasonable return upon its investment for an extended period of time as this would constitute a confiscation of its property in violation of due process of law.
N.Y.—[New Rochelle Water Co. v. Public Service Commission](#), 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972).
3 Cal.—[Besaro Mobile Home Park, LLC v. City of Fremont](#), 204 Cal. App. 4th 345, 138 Cal. Rptr. 3d 774 (1st Dist. 2012) (landlords subject to rent control pricing).
4 U.S.—[Public Service Com'n of Montana v. Great Northern Utilities Co.](#), 289 U.S. 130, 53 S. Ct. 546, 77 L. Ed. 1080 (1933).
5 U.S.—[Hegeman Farms Corporation v. Baldwin](#), 293 U.S. 163, 55 S. Ct. 7, 79 L. Ed. 259 (1934).
6 U.S.—[Railroad Commission of California v. Pacific Gas & Electric Co.](#), 302 U.S. 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938).
7 U.S.—[Federal Power Commission v. Natural Gas Pipeline Co. of America](#), 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942); [D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission](#), 466 F.2d 394 (D.C. Cir. 1972).
Cal.—[City of Los Angeles v. Public Utilities Com.](#), 15 Cal. 3d 680, 125 Cal. Rptr. 779, 542 P.2d 1371 (1975).
Fla.—[United Telephone Co. of Fla. v. Mayo](#), 215 So. 2d 609 (Fla. 1968).
Tex.—[General Tel. Co. of the Southwest v. Public Utility Commission of Texas](#), 628 S.W.2d 832 (Tex. App. Austin 1982), writ refused n.r.e., (June 30, 1982).
8 U.S.—[Public Service Commission for State of N. Y. v. Federal Power Commission](#), 467 F.2d 361 (D.C. Cir. 1972).
9 Cal.—[City and County of San Francisco v. Public Utilities Com.](#), 6 Cal. 3d 119, 98 Cal. Rptr. 286, 490 P.2d 798 (1971).

10 U.S.—[Federal Power Commission v. Natural Gas Pipeline Co. of America](#), 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942).

11 Utah—[Utility Consumer Action Group v. Public Service Commission](#), 583 P.2d 605 (Utah 1978).

11 N.J.—[Borland v. Bayonne Hospital](#), 122 N.J. Super. 387, 300 A.2d 584 (Ch. Div. 1973), judgment aff'd, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975), judgment aff'd, 72 N.J. 152, 369 A.2d 1 (1977).

12 Ohio—[County Commissioners' Ass'n of Ohio v. Public Utilities Commission of Ohio](#), 63 Ohio St. 2d 243, 17 Ohio Op. 3d 150, 407 N.E.2d 534 (1980); [City of Cincinnati v. Public Utilities Commission](#), 55 Ohio St. 2d 168, 9 Ohio Op. 3d 130, 378 N.E.2d 729 (1978).

12 Wyo.—[Great Western Sugar Co. v. Johnson](#), 624 P.2d 1184 (Wyo. 1981).

13 N.J.—[Borland v. Bayonne Hospital](#), 122 N.J. Super. 387, 300 A.2d 584 (Ch. Div. 1973), judgment aff'd, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975), judgment aff'd, 72 N.J. 152, 369 A.2d 1 (1977).

13 Ohio—[County Commissioners' Ass'n of Ohio v. Public Utilities Commission of Ohio](#), 63 Ohio St. 2d 243, 17 Ohio Op. 3d 150, 407 N.E.2d 534 (1980).

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16D C.J.S. Constitutional Law § 2287

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2287. Rate or price determination—Administrative procedure

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4082, 4264, 4361

Due process of law does not require that notice or an opportunity for a hearing be given before the adoption of a statute or ordinance fixing rates; however, the regulated company affected by any proposed rate change must be afforded procedural due process.

Since the fixing of rates is a legislative matter, due process does not require that interested parties be given notice or an opportunity for a hearing before the adoption of a statute or ordinance fixing rates.¹

Consumers have no property right, in the constitutional sense, in their utility rates and may not attack them, on the basis of substantive due process, as being too high.² Also, the rate paid by a utility consumer is not protectable by procedural due process.³ Where the rate-setting body acts in a legislative, rather than judicial capacity, it is not required to give judicial due process notice and hearing to customers of the utility in the absence of a statutory requirement.⁴ In some jurisdictions, consumers have been afforded certain statutory procedural rights with respect to rate adjustments which have been held to satisfy procedural due process requirements,⁵ and a denial of such rights constitutes, accordingly, a violation of due process.⁶

The regulated company affected by any proposed rate change must be afforded procedural due process⁷ and must be permitted the introduction of, and consideration of, all competent and relevant evidence.⁸ However, full rights of confrontation and cross-examination are not required.⁹ Also, due process is not denied by a board or commission in refusing to grant a rehearing after careful consideration.¹⁰

Public inspection at reasonable times of the information on which filed rates are based,¹¹ before they become effective,¹² has been held to be a due process requirement.

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Footnotes

1 U.S.—[Home Tel. & Tel. Co. v. City of Los Angeles](#), 155 F. 554 (C.C.S.D. Cal. 1907), aff'd, 211 U.S. 265, 29 S. Ct. 50, 53 L. Ed. 176 (1908).

N.H.—[State v. Maine Cent. R. R.](#), 77 N.H. 425, 92 A. 837 (1914).

2 Ga.—[Georgia Power Co. v. Allied Chemical Corp.](#), 233 Ga. 558, 212 S.E.2d 628 (1975).

Ky.—[Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.](#), 983 S.W.2d 493 (Ky. 1998).

Broad state authority to regulate public utility rates

Tex.—[City of Corpus Christi v. Public Utility Com'n of Texas](#), 51 S.W.3d 231 (Tex. 2001).

3 Mo.—[State ex rel. Jackson County v. Public Service Commission](#), 532 S.W.2d 20 (Mo. 1975).

4 Colo.—[Cottrell v. City and County of Denver](#), 636 P.2d 703 (Colo. 1981).

Okla.—[Chickasha Cotton Oil Co. v. Corporation Commission](#), 1977 OK 40, 562 P.2d 507 (Okla. 1977).

5 Mass.—[Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities](#), 368 Mass. 599, 335 N.E.2d 341 (1975).

6 Fla.—[Robbins v. Webb's Cut Rate Drug Co.](#), 153 Fla. 822, 16 So. 2d 121 (1943).

Utah—[Utility Consumer Action Group v. Public Service Commission](#), 583 P.2d 605 (Utah 1978).

7 Fla.—[Florida Power Corp. v. Hawkins](#), 367 So. 2d 1011 (Fla. 1979).

Ky.—[Kentucky Power Co. v. Energy Regulatory Commission of Kentucky](#), 623 S.W.2d 904 (Ky. 1981).

Hearing in advance of initiating order

Due process does not require that a hearing should be accorded in advance of an initiating order preliminary to the fixing of a particular rate; it is enough that an opportunity is given for a full and fair hearing before the order becomes operative.

U.S.—[U.S. v. Illinois Cent. R. Co.](#), 291 U.S. 457, 54 S. Ct. 471, 78 L. Ed. 909 (1934).

8 Ill.—[Illinois Cent. R. Co. v. Illinois Commerce Commission](#), 387 Ill. 256, 56 N.E.2d 432 (1944).

Wash.—[State ex rel. Puget Sound Nav. Co. v. Department of Transp. of Wash.](#), 33 Wash. 2d 448, 206 P.2d 456 (1949).

Limitation of testimony in violation of due process

The two-minute limit on testimony unduly restricted the evidentiary presentation at a county rent review board hearing in violation of due process, requiring remand for the board to make new findings after a constitutionally adequate hearing, where the board found that mobile home park tenants rescinded their leases even though the tenants did not testify on the elements of rescission.

Cal.—[Manufactured Home Communities, Inc. v. County of San Luis Obispo](#), 167 Cal. App. 4th 705, 84 Cal. Rptr. 3d 367 (2d Dist. 2008).

Limitation of cross-examination in violation of due process

A county rent review board's denial of an opportunity for mobile home park landlords to cross-examine park tenants violated the landlords' right to due process, in a hearing in which the board found that proposed rent increases were invalid, where the board made several findings against the landlords based on the tenants' testimony.

Cal.—[Manufactured Home Communities, Inc. v. County of San Luis Obispo](#), 167 Cal. App. 4th 705, 84 Cal. Rptr. 3d 367 (2d Dist. 2008).

9 Cal.—[Stardust Mobile Estates v. City of San Buenaventura](#), 147 Cal. App. 4th 1170, 55 Cal. Rptr. 3d 218 (2d Dist. 2007).

10 U.S.—[Beaumont, S. L. & W. Ry. Co. v. U.S.](#), 36 F.2d 789 (W.D. Mo. 1929), aff'd, [282 U.S. 74](#), [51 S. Ct. 1](#), [75 L. Ed. 221](#) (1930); [Central R. Co. of N.J. v. U.S.](#), 99 F. Supp. 564 (D.N.J. 1951), judgment aff'd, [342 U.S. 935](#), [72 S. Ct. 567](#), [96 L. Ed. 696](#) (1952).

11 U.S.—[515 Associates v. City of Newark](#), 424 F. Supp. 984 (D.N.J. 1977).

Alaska—[City of Fairbanks v. Alaska Public Utilities Commission](#), 611 P.2d 493 (Alaska 1980).

12 Mich.—[Shavers v. Kelley](#), 402 Mich. 554, 267 N.W.2d 72 (1978).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2288. Rate or price determination—Judicial review

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4082, 4264, 4361

The right to judicial review of an action establishing rates is not dependent upon the legislature but is guaranteed by due process.

The right to judicial review of an action establishing rates is not dependent upon the legislature but is guaranteed by due process, and this constitutional authority may not be denied by legislative action or nonaction.¹ To effect due process in rate cases, no more than review in the nature of certiorari has been required.²

The function of courts under the Fifth and Fourteenth Amendments, in passing on legislation relating to price control, is to determine in each case whether, under the circumstances, the regulation is a reasonable exercise of governmental authority or is arbitrary or discriminatory.³ While a *prima facie* presumption is indulged in favor of the reasonableness of a price or rate prescribed by statute or administrative regulation, the ultimate determination of the question of reasonableness is for the judiciary.⁴

Due process has been held not to compel judicial review of the preliminary procedural processes of a rate regulating commission.⁵

Where a statute provides for full judicial review of proceedings and final orders of a board or commission, and gives the court such revisory jurisdiction of proceedings of administrative officers as may be conferred by law, there is no due process violation.⁶ Also, due process is not denied by legislation making administratively fixed rates binding until changed, after judicial inquiry into the validity thereof.⁷

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Footnotes

1 Ind.—[Underwood v. City of Jasper Mun. Utility Service Bd.](#), 678 N.E.2d 1280 (Ind. Ct. App. 1997) (rejected on other grounds by, [Indiana Dept. Of Transp. v. Shelly & Sands, Inc.](#), 756 N.E.2d 1063 (Ind. Ct. App. 2001)).

2 Mich.—[Michigan Consolidated Gas Co. v. Michigan Public Service Commission](#), 389 Mich. 624, 209 N.W.2d 210 (1973).

3 N.J.—[Hutton Park Gardens v. Town Council of Town of West Orange](#), 68 N.J. 543, 350 A.2d 1 (1975).

4 S.D.—[In re Northwestern Bell Telephone Co.](#), 73 S.D. 370, 43 N.W.2d 553 (1950).

5 U.S.—[Norfolk & W. Ry. Co. v. Conley](#), 236 U.S. 605, 35 S. Ct. 437, 59 L. Ed. 745 (1915).

6 Fla.—[McRae v. Robbins](#), 151 Fla. 109, 9 So. 2d 284 (1942).

7 U.S.—[Colorado Interstate Gas Co. v. Federal Power Commission](#), 370 F.2d 777 (10th Cir. 1967).

Ohio—[Hocking Valley Ry. Co. v. Public Utilities Commission](#), 100 Ohio St. 321, 126 N.E. 397 (1919).

U.S.—[Detroit & M. Ry. Co. v. Fletcher Paper Co.](#), 248 U.S. 30, 39 S. Ct. 13, 63 L. Ed. 107 (1918).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

1. In General

§ 2289. Retroactive application of rate change

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4082, 4264, 4267

Due process does not require the retroactive application of a rate increase.

Due process does not require the retroactive application of a rate increase to the date on which it was suspended,¹ or to the date on which a smaller increase than the one proposed was temporarily approved,² and, accordingly, there is no due process requirement that a utility be awarded reparations, based on a rule finally approved, to cover the period during which the propriety of a proposed rate was considered.³

On the other hand, a utility must be made whole retroactively following a temporary rate reduction if it is finally determined that the temporarily reduced rates have been too low.⁴

Although a retroactive annulment of a rate is not an unlawful taking of property within the Fourteenth Amendment,⁵ due process is violated by a redetermination of rates already established and paid⁶ or by a requirement to refund rents already collected,⁷

although there is authority to the contrary requiring successor landlords to refund excess rent collected by former landlords,⁸ or requiring a landlord already on notice that it would need to refund excess rents.⁹

A retroactive application of rates does not violate due process where a claim does not involve an assertion of any vested right¹⁰ or where such a change is not an unforeseen or arbitrary change in the law.¹¹ Furthermore, a retroactive application of a regulation does not violate a due process right where affected persons are still able to seek a remedy for their alleged wrong.¹²

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Footnotes

- 1 N.Y.—[New Rochelle Water Co. v. Public Service Commission](#), 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972).
- 2 N.Y.—[New Rochelle Water Co. v. Public Service Commission](#), 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972).
- 3 N.Y.—[New Rochelle Water Co. v. Public Service Commission](#), 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972).
- 4 U.S.—[Prendergast v. New York Telephone Co.](#), 262 U.S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923).
N.Y.—[New Rochelle Water Co. v. Public Service Commission](#), 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972).
- 5 U.S.—[Great Northern Ry. Co. v. Sunburst Oil & Refining Co.](#), 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).
- 6 Mo.—[State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission](#), 585 S.W.2d 41 (Mo. 1979) (rejected on other grounds by, [People's Counsel of Dist. of Columbia v. Public Service Com'n of Dist. of Columbia](#), 472 A.2d 860 (D.C. 1984)).
Neb.—[Farmers Union Livestock Com'n v. Union Pac. R. Co.](#), 135 Neb. 689, 283 N.W. 498 (1939).
- 7 N.J.—[Woodcliff Management v. North Bergen Tp.](#), 127 N.J. Super. 123, 316 A.2d 494 (Law Div. 1974).
- 8 Cal.—[Baychester Shopping Center, Inc. v. San Francisco Residential Rent Stabilization and Arbitration Bd. of City and County of San Francisco](#), 165 Cal. App. 4th 1000, 81 Cal. Rptr. 3d 341 (1st Dist. 2008).
- 9 N.Y.—[Belnord Realty Associates, L.P. v. New York State Div. of Housing and Community Renewal](#), 39 A.D.3d 226, 833 N.Y.S.2d 431 (1st Dep't 2007).
- 10 U.S.—[Lewis v. Squareshotter Candy Co.](#), 176 B.R. 54 (D. Kan. 1994).
- 11 N.Y.—[London Terrace Gardens, L.P. v. City of New York](#), 101 A.D.3d 27, 953 N.Y.S.2d 28 (1st Dep't 2012), leave to appeal denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970 (2013).
- 12 Ala.—[Dickinson v. Cosmos Broadcasting Co., Inc.](#), 782 So. 2d 260 (Ala. 2000).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

2. Particular Types of Industries, Products, or Commodities Regulated

§ 2290. Carriers

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  4362 to 4368

Fair and reasonable regulation of a carrier's rates or charges by the legislature or an agency does not contravene the constitutional guaranty of due process of law.

As a general rule, fair and reasonable governmental regulation of the charges or rates exacted by carriers does not contravene the constitutional guaranty of due process of law.¹

Due process guaranties are not transgressed by legislation prescribing reasonable rates to be charged by common carriers,² or prohibiting carriers from charging more for a short rather than a long haul,³ or requiring carriers to hold excess income as trustee for the government for prescribed uses, in order to equalize inequalities in rates,⁴ or authorizing administrative officers or bodies to regulate the rates of carriers,⁵ including contract or motor carriers.⁶

Due process may be violated by requiring a carrier to operate⁷ or to furnish a service⁸ at a loss. Accordingly, rates for carriers fixed by authorized legislative or administrative officers or bodies are violative of due process guaranties where they fail to

give the carrier a fair return,⁹ in the community where the service is rendered, based on the fair and reasonable value of the going concern.¹⁰ In this connection, a reasonable method of fixing the rate base may be used without violating the requirement of due process.¹¹

It has been held, however, that the Fourteenth Amendment does not assure to a carrier the right under all circumstances to have a return on the value of the property used,¹² and as long as rates as a whole afford the carrier just compensation for overall services to the public, the Due Process Clause of the Constitution is not a bar to the fixing of noncompensatory rates for the performance of certain services when the public interest is thereby served.¹³

Rate-fixing orders by officers or bodies which are arbitrary or lack evidential support violate due process guaranties;¹⁴ nevertheless, in determining the reasonableness of a proposed fare, a commission does not violate due process guaranties by considering the character¹⁵ and value¹⁶ of the service rendered by the carrier and the practical results to the public of advances which the commission has allowed in rates.¹⁷

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Footnotes

- 1 U.S.—[Market St. Ry. Co. v. Railroad Commission of State of Cal.](#), 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).
- 2 U.S.—[State of Washington ex rel. Stimson Lumber Co. v. Kuykendall](#), 275 U.S. 207, 48 S. Ct. 41, 72 L. Ed. 241 (1927).
- 3 U.S.—[Missouri Pac. R. Co. v. McGrew Coal Co.](#), 244 U.S. 191, 37 S. Ct. 518, 61 L. Ed. 1075 (1917).
- 4 U.S.—[Dayton-Goose Creek Ry. Co. v. U.S.](#), 263 U.S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A.L.R. 472 (1924).
- 5 U.S.—[U.S. v. Illinois Cent. R. Co.](#), 291 U.S. 457, 54 S. Ct. 471, 78 L. Ed. 909 (1934).
Cal.—[Southern Pac. Co. v. Railroad Commission of Cal.](#), 13 Cal. 2d 89, 87 P.2d 1055 (1939).
- 6 U.S.—[Stephenson v. Binford](#), 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932).
Wash.—[Pacific Inland Tariff Bureau v. Schaaf](#), 1 Wash. 2d 210, 95 P.2d 781 (1939).
Wyo.—[State v. Grimshaw](#), 49 Wyo. 192, 53 P.2d 13 (1935).
- 7 U.S.—[Democratic Central Committee of District of Columbia v. Washington Metropolitan Area Transit Commission](#), 436 F.2d 233 (D.C. Cir. 1970).
- 8 Okla.—[St. Louis-San Francisco Ry. Co. v. State](#), 1970 OK 225, 478 P.2d 354 (Okla. 1970).
- 9 U.S.—[Westinghouse Elec. & Mfg. Co. v. Denver Tramway Co.](#), 3 F.2d 285 (D. Colo. 1924).
Ill.—[Sprague v. Biggs](#), 390 Ill. 537, 62 N.E.2d 420 (1945).
As to the right to a fair return, generally, see § 2286.
- 10 U.S.—[Henry L. Doherty & Co. v. Toledo Rys. & Light Co.](#), 254 F. 597 (N.D. Ohio 1918).
- 11 U.S.—[Market St. Ry. Co. v. Railroad Commission of State of Cal.](#), 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).
Cal.—[Market St. Ry. Co. v. Railroad Commission](#), 24 Cal. 2d 378, 150 P.2d 196 (1944), judgment aff'd, 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).
- 12 U.S.—[BNSF Ry. Co. v. Surface Transp. Bd.](#), 453 F.3d 473 (D.C. Cir. 2006).
U.S.—[Hudson & M.R. Co. v. U.S.](#), 33 F. Supp. 495 (D.N.J. 1940), decree aff'd by, 313 U.S. 98, 61 S. Ct. 884, 85 L. Ed. 1212 (1941).

13 U.S.—[Baltimore & O. R. Co. v. U.S.](#), 345 U.S. 146, 73 S. Ct. 592, 97 L. Ed. 912 (1953).

14 U.S.—[Northern Pac. Ry. Co. v. Department of Public Works of Washington](#), 268 U.S. 39, 45 S. Ct. 412, 69 L. Ed. 836 (1925).

Va.—[Atlantic Coast Line R. Co. v. Commonwealth](#), 145 Va. 62, 133 S.E. 883 (1926).

Wash.—[State ex rel. Puget Sound Nav. Co. v. Department of Transp. of Wash.](#), 33 Wash. 2d 448, 206 P.2d 456 (1949).

15 N.J.—[New Jersey Central Traction Co. v. Board of Public Utility Com'rs](#), 96 N.J.L. 90, 113 A. 692 (N.J. Sup. Ct. 1921).

16 U.S.—[Market St. Ry. Co. v. Railroad Commission of State of Cal.](#), 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

17 U.S.—[Market St. Ry. Co. v. Railroad Commission of State of Cal.](#), 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

M. Prices, Charges, and Rates

2. Particular Types of Industries, Products, or Commodities Regulated

§ 2291. Gas and electric companies

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4371

Reasonable regulation of rates of gas and electric companies by the legislature or its agencies is not in violation of constitutional guaranties of due process.

The price of gas distributed for public consumption is a proper subject of regulation under the Fifth and Fourteenth Amendments of the Federal Constitution;¹ accordingly, the regulation of prices charged by natural gas producers² and transporters,³ as well as by gas and electric companies serving the public,⁴ has withstood challenges on due process grounds. Moreover, constitutional due process guaranties are not violated by a state, in the exercise of its police power, in regulating or fixing rates of gas and electric companies even if by doing so it supersedes rates fixed by private contract⁵ or franchise.⁶

Rate fixing of gas and electric company prices by administrative officers or bodies, pursuant to delegated authority, does not violate due process⁷ where it is reasonable⁸ and based on a proper valuation of the regulated utility's assets⁹ and their depreciation.¹⁰

On the other hand, due process may be violated by a fixing of gas or electric company rates,¹¹ including temporary or emergency rates,¹² which are so low as to be, in effect, confiscatory¹³ in that they preclude a fair return on the present fair value of the company property, with proper allowance for depletion of assets.¹⁴ Due process guarantees may also be violated by legislation or orders of legislative or administrative officers or boards requiring gas or electric companies to perform services outside their original undertakings, without compensation.¹⁵

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Footnotes

- 1 U.S.—*Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942).
- 2 U.S.—*Southern Louisiana Area Rate Cases v. Federal Power Commission*, 428 F.2d 407 (5th Cir. 1970), on reh'g, 444 F.2d 125 (5th Cir. 1970).
- 3 U.S.—*Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942).
- 4 U.S.—*Minnesota Gas Co. v. Public Service Commission, Dept. of Public Service, State of Minn.*, 523 F.2d 581 (8th Cir. 1975).
- 5 U.S.—*U.S. v. Oklahoma Gas & Elec. Co.*, 297 F. 575 (C.C.A. 8th Cir. 1924).
Va.—*Commonwealth ex rel. Page Milling Co. v. Shenandoah River Light & Power Corporation*, 135 Va. 47, 115 S.E. 695 (1923).
W. Va.—*Mill Creek Coal & Coke Co. v. Public Service Com'n*, 84 W. Va. 662, 100 S.E. 557, 7 A.L.R. 1081 (1919).
- 6 Okla.—*City of Sapulpa v. Oklahoma Natural Gas Co.*, 1920 OK 139, 79 Okla. 196, 192 P. 224 (1920).
- 7 U.S.—*Jacksonville Gas Co. v. City of Jacksonville*, 286 F. 404 (S.D. Fla. 1923).
Fla.—*Florida Power Corp. v. Pinellas Utility Bd.*, 40 So. 2d 350 (Fla. 1949).
- 8 D.C.—*Potomac Elec. Power Co. v. Public Service Commission*, 380 A.2d 126 (D.C. 1977).
Idaho—*Intermountain Gas Co. v. Idaho Public Utilities Commission*, 97 Idaho 113, 540 P.2d 775 (1975).
Va.—*Appalachian Power Co. v. Com.*, 216 Va. 617, 221 S.E.2d 872 (1976).
- 9 Idaho—*Intermountain Gas Co. v. Idaho Public Utilities Commission*, 97 Idaho 113, 540 P.2d 775 (1975).
Ohio—*Ohio Utilities Co. v. Public Utilities Commission*, 58 Ohio St. 2d 153, 12 Ohio Op. 3d 167, 389 N.E.2d 483 (1979).
- 10 Pa.—*Pennsylvania Power & Light Co. v. Pennsylvania Public Utility Commission*, 10 Pa. Commw. 328, 311 A.2d 151 (1973).
- 11 U.S.—*Indiana General Service Co. v. McCardle*, 1 F. Supp. 113 (S.D. Ind. 1932).
Wis.—*Wisconsin-Minnesota Light & Power Co. v. Railroad Commission of Wisconsin*, 183 Wis. 96, 197 N.W. 359 (1924).
- 12 U.S.—*Indiana General Service Co. v. McCardle*, 1 F. Supp. 113 (S.D. Ind. 1932).
N.Y.—*New York Edison Co. v. Maltbie*, 244 A.D. 436, 279 N.Y.S. 949 (3d Dep't 1935).
- 13 U.S.—*Ottinger v. Brooklyn Union Gas Co.*, 272 U.S. 579, 47 S. Ct. 199, 71 L. Ed. 421 (1926).
Ga.—*Georgia Power Co. v. Allied Chemical Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).
N.Y.—*Kings County Lighting Co. v. Newton*, 202 A.D. 473, 195 N.Y.S. 147 (1st Dep't 1922), aff'd, 235 N.Y. 599, 139 N.E. 750 (1923).
- 14 U.S.—*Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942).
- 15 Mass.—*In re Opinion of the Justices*, 300 Mass. 591, 14 N.E.2d 392, 115 A.L.R. 1158 (1938).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 2292. Gas and electric companies—Administrative procedure

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4371

Traditional due process rights are applicable to administrative proceedings in which gas or electric rates, permanent or interim, are set.

Traditional due process rights are applicable to administrative proceedings in which gas or electric rates, permanent or interim, are set,¹ and there must be notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the commission must act on the evidence and not arbitrarily.² Nevertheless, due process does not require a hearing unless there is an issue in dispute to be decided³ or where the dispute involves an interpretation of law rather than a resolution of factual issues.⁴

A denial of due process may be found where the commission does not afford a fair hearing,⁵ or values the property without evidence,⁶ or makes arbitrary or unreasonable orders⁷ or orders as to rates or contracts not within its jurisdiction.⁸

On the other hand, the approval, without a hearing, by a utilities commission of a rate increase sought by a gas or electric company does not violate procedural due process if the rate increase is subject to challenge by any interested party⁹ and if an opportunity is afforded to recover any excessive rates paid.¹⁰ However, where a commission's decision to govern in a cloak of secrecy and grant confidentiality to rate-impact information is arbitrary and capricious, there is a due process violation.¹¹

A municipality, as a rate payer, has no due process right to notice and a hearing prior to the implementation by a public utilities commission of a rate for a new service where such a notice and hearing are not required by statute.¹²

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Footnotes

- 1 Fla.—[Citizens of Florida v. Mayo](#), 333 So. 2d 1 (Fla. 1976).
- 2 U.S.—[Railroad Commission of California v. Pacific Gas & Electric Co.](#), 302 U.S. 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938).
Ala.—[Opinion of the Justices](#), 345 So. 2d 1354 (Ala. 1977).
- 3 N.H.—[Appeal of Public Service Co. of New Hampshire](#), 130 N.H. 285, 539 A.2d 275 (1988).
- 4 Pa.—[West Penn Power Co. v. Pennsylvania Public Utility Com'n](#), 659 A.2d 1055 (Pa. Commw. Ct. 1995).
Iowa—[Peoples Natural Gas Co., Div. of Internorth, Inc. v. Iowa State Commerce Com'n](#), 382 N.W.2d 452 (Iowa 1986).
- 5 Fla.—[Florida Gas Co. v. Hawkins](#), 372 So. 2d 1118 (Fla. 1979).
Pa.—[Duquesne Light Co. v. Pennsylvania Public Utility Com'n](#), 96 Pa. Commw. 168, 507 A.2d 433 (1986).
W. Va.—[Virginia Elec. and Power Co. v. Public Service Commission of West Virginia](#), 162 W. Va. 202, 248 S.E.2d 322 (1978).
- 6 U.S.—[Public Service Com'n of Kentucky v. F.E.R.C.](#), 397 F.3d 1004 (D.C. Cir. 2005); [Laclede Gas Light Co. v. Public Service Com'n of State of Missouri](#), 8 F. Supp. 806 (W.D. Mo. 1934).
Ariz.—[Arizona Corp. Commission v. Citizens Utilities Co.](#), 120 Ariz. 184, 584 P.2d 1175 (Ct. App. Div. 1 1978).
- 7 U.S.—[West Ohio Gas Co. v. Public Utilities Commission of Ohio](#), 42 F.2d 899 (N.D. Ohio 1928).
- 8 U.S.—[Natural Gas Pipeline Co. of America v. Slattery](#), 302 U.S. 300, 58 S. Ct. 199, 82 L. Ed. 276 (1937).
- 9 U.S.—[Hunt Oil Co. v. Federal Power Commission](#), 424 F.2d 982 (5th Cir. 1970).
N.C.—[State ex rel. Utilities Commission v. Edmisten](#), 294 N.C. 598, 242 S.E.2d 862 (1978).
- 10 Pa.—[Allegheny Ludlum Steel Corp. v. Pennsylvania Public Utility Com'n](#), 67 Pa. Commw. 400, 447 A.2d 675 (1982), judgment aff'd, 501 Pa. 71, 459 A.2d 1218 (1983).
- 11 Miss.—[Mississippi Power Co., Inc. v. Mississippi Public Service Com'n](#), 2015 WL 574723 (Miss. 2015).
- 12 Ohio—[City of Cleveland v. Public Utilities Commission of Ohio](#), 67 Ohio St. 2d 446, 21 Ohio Op. 3d 279, 424 N.E.2d 561 (1981).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 2293. Telecommunication companies

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4370

Fair and reasonable regulation of the rates of telecommunication companies by the legislature or its agencies does not violate the constitutional guaranty of due process of law.

Legislation reasonably regulating or fixing the rates of telecommunication companies, or granting this power to a commission, ordinarily does not contravene constitutional guaranties of due process of law,¹ especially where the regulating agency does not act arbitrarily and capriciously or without a rational basis.² Telecommunications companies have no constitutionally protected interest in charging any particular rate for a service or in earning any particular rate of return on investment.³ However, due process guaranties are violated where telephone or other telecommunications rates are fixed so as to be in fact confiscatory⁴ as where they preclude a reasonable rate of return.⁵

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Footnotes

1 Ky.—[Smith v. Southern Bell Tel. & Tel. Co.](#), 268 Ky. 421, 104 S.W.2d 961 (1937).

2 U.S.—[E. Spire Communications, Inc. v. Baca](#), 269 F. Supp. 2d 1310 (D.N.M. 2003), aff'd, 392 F.3d 1204 (10th Cir. 2004).

3 Mich.—[Verizon North, Inc. v. Public Service Commission](#), 260 Mich. App. 432, 677 N.W.2d 918 (2004).

4 U.S.—[Chesapeake & Potomac Telephone Co. of Baltimore City v. West](#), 7 F. Supp. 214 (D. Md. 1934), aff'd, 295 U.S. 662, 55 S. Ct. 894, 79 L. Ed. 1640 (1935).

5 Ark.—[Southwestern Bell Telephone Co. v. Arkansas Public Service Commission](#), 267 Ark. 550, 593 S.W.2d 434 (1980).

N.M.—[Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission](#), 1977-NMSC-032, 90 N.M. 325, 563 P.2d 588 (1977).

Ohio—[Elyria Tel. Co. v. Public Utilities Commission](#), 158 Ohio St. 441, 49 Ohio Op. 391, 110 N.E.2d 59 (1953).

As to the right to a reasonable return, see § 2286.

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§ 2294. Telecommunication companies—Administrative procedure and judicial review

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4370

Generally, adequate notice and fair hearing are required in proceedings for fixing or refunding of telecommunication rates.

In proceedings before a commission for the fixing or refunding of telephone or other telecommunication rates, adequate notice¹ and a fair hearing² are essential to due process, and the findings of the commission must be supported by the evidence.³

Where the nature of the hearing is legislative rather than judicial, the application of the due process requirements is not required.⁴

Where the rates of telecommunication companies have been fixed by the state or its agencies, under due process guaranties, the companies are entitled to have the issue of confiscation submitted to a judicial tribunal for determination on its own independent judgment as to both the law and the facts.⁵

Footnotes

1 Ind.—[Nextel West Corp. v. Indiana Utility Regulatory Com'n](#), 831 N.E.2d 134 (Ind. Ct. App. 2005) (due process was not violated even though the commission did not publish notice in each county where rates could be affected).

Miss.—[Mississippi Public Service Commission v. City of Jackson](#), 328 So. 2d 656 (Miss. 1976).

N.M.—[Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission](#), 1977-NMSC-032, 90 N.M. 325, 563 P.2d 588 (1977).

2 N.Y.—[New York Telephone Co. v. Public Service Com'n](#), 64 A.D.2d 232, 410 N.Y.S.2d 124 (3d Dep't 1978).

Va.—[Board of Sup'r's of Fairfax County v. Chesapeake & Potomac Tel. Co.](#), 212 Va. 57, 182 S.E.2d 30 (1971).

3 Minn.—[State v. Tri-State Tel. & Tel. Co.](#), 204 Minn. 516, 284 N.W. 294 (1939).

Adoption of prior case law may violate due process

Due process is violated where the commission adopts findings involving pricing methodologies from earlier cases in which the telecommunications company in the current case did not participate, the commission did not give the telecommunications company an opportunity to present evidence and cross-examine witnesses regarding such findings, and evidence supporting such findings from the earlier case was not entered into the record.

N.M.—[TW Telecom of New Mexico, L.L.C. v. New Mexico Public Regulation Com'n](#), 2011-NMSC-029, 150 N.M. 12, 256 P.3d 24 (2011).

4 Okla.—[Southwestern Bell Telephone Co. v. Oklahoma Corp. Com'n](#), 1994 OK 38, 873 P.2d 1001 (Okla. 1994).

5 Alaska—[U. S. v. RCA Alaska Communications, Inc.](#), 597 P.2d 489 (Alaska 1978).

Minn.—[Western Buse Telephone Co. v. Northwestern Bell Telephone Co.](#), 188 Minn. 524, 248 N.W. 220 (1933).

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§ 2295. Water, sewer, and irrigation companies

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4372

Fair and reasonable regulation by the legislature or its agencies of rates of water, sewer, and irrigation companies does not violate constitutional requirements of due process of law.

Legislation reasonably regulating or fixing the rates of water, sewer, and irrigation companies, or granting this power to legislative or administrative bodies, does not violate the constitutional guaranties of due process of law,¹ and such bodies, when acting fairly and within the scope of their powers, do not infringe these guaranties by fixing reasonable rates,² or by ordering such companies to file rates.³ Furthermore, a denial of a rate increase does not violate the Due Process Clause given evidence that the water utility provided inadequate service to customers.⁴

On the other hand, due process guaranties are transgressed by legislation or orders of legislative or administrative officers or bodies fixing rates of water, sewer, and irrigation companies, so low as to preclude a fair return on the reasonable present value of the property used, based on a consideration of both original and reproduction costs,⁵ as well as the going value of the property.⁶

Due process ordinarily entitles such companies to a hearing upon notice with an opportunity to offer proof, in the determination of their rates,⁷ and to an independent judgment by a judicial tribunal on both the law and the facts, as to whether the rates fixed are confiscatory.⁸

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Footnotes

1 N.M.—[Application of Timberon Water Co., Inc.](#), 1992-NMSC-047, 114 N.M. 154, 836 P.2d 73 (1992).

Pa.—[Vitacolonna v. City of Philadelphia](#), 382 Pa. 399, 115 A.2d 178 (1955).

2 U.S.—[Beaver Valley Water Co. v. Driscoll](#), 28 F. Supp. 722 (W.D. Pa. 1939).

Rate attached to Consumer Price Index

Local water district initiatives that allowed future rate increases were not unconstitutionally vague in violation of due process in stating that the increases could be indexed to the Consumer Price Index (CPI), even though the CPI was not a single number but rather a large family of indexes, since the process of elimination indicated that the drafters of the initiatives must have had in mind the all-items CPI-U (for urban consumers) for the geographical area where the district was located.

Cal.—[Mission Springs Water District v. Verjil](#), 218 Cal. App. 4th 892, 160 Cal. Rptr. 3d 524 (4th Dist. 2013), review denied, (Oct. 16, 2013).

3 Cal.—[Albin v. Railroad Commission](#), 216 Cal. 655, 15 P.2d 860 (1932).

4 Pa.—[National Utilities, Inc. v. Pennsylvania Public Utility Com'n](#), 709 A.2d 972 (Pa. Commw. Ct. 1998).

5 U.S.—[California Water & Tel. Co. v. Railroad Commission of Cal.](#), 19 F. Supp. 11 (N.D. Cal. 1937).

Fla.—[Westwood Lake, Inc. v. Dade County](#), 264 So. 2d 7 (Fla. 1972).

Iowa—[Davenport Water Co. v. Iowa State Commerce Commission](#), 190 N.W.2d 583 (Iowa 1971).

As to a reasonable rate of return, generally, see § 2286.

6 U.S.—[California Water & Tel. Co. v. Railroad Commission of Cal.](#), 19 F. Supp. 11 (N.D. Cal. 1937).

7 U.S.—[Beaver Valley Water Co. v. Driscoll](#), 23 F. Supp. 795 (W.D. Pa. 1938).

Me.—[Mechanic Falls Water Co. v. Public Utilities Commission](#), 381 A.2d 1080 (Me. 1977).

N.Y.—[Silberberg v. Citizens' Water Supply Co. of Newtown](#), 116 Misc. 595, 190 N.Y.S. 349 (Sup 1921).

8 U.S.—[Bluefield Waterworks & Imp. Co. v. Public Service Commission of W. Va.](#), 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923).

N.J.—[New Jersey Suburban Water Co. v. Board of Public Utility Com'rs](#), 123 N.J.L. 303, 8 A.2d 350 (N.J. Ct. Err. & App. 1939).

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§ 2296. Other particular types of products or commodities

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West's Key Number Digest

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Contentions as to the constitutionality under the Due Process Clause of either the Fifth or Fourteenth Amendment of various price, rate, fee, and charge regulations have been adjudicated with respect to many diverse matters.

Contentions as to the constitutionality under the Due Process Clause of either the Fifth or the Fourteenth Amendment of various price, rate, fee, and charge regulations have been adjudicated with respect to diverse matters, such as the requirement of unit pricing¹ and prices chargeable for commodities such as coal,² crude oil,³ diesel fuel,⁴ gasoline or liquid fuel,⁵ and other petroleum products.⁶

Also, the validity of various price, rate, fee, and charge regulations, which have been challenged on due process grounds, has been adjudicated with respect to food or other consumer products,⁷ such as meat,⁸ milk,⁹ liquor,¹⁰ and cigars and cigarettes.¹¹

Similarly, contentions as to the constitutionality under the Due Process Clause of other various price, rate, fee, and charge regulations have been adjudicated with respect to pilotage,¹² hospital,¹³ heating,¹⁴ insurance,¹⁵ and interest¹⁶ and finance charges.¹⁷

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Footnotes

1 N.Y.—[Wegman's Food Markets, Inc. v. State](#), 76 A.D.2d 95, 429 N.Y.S.2d 964 (4th Dep't 1980).

2 U.S.—[Highland v. Russell Car & Snowplow Co.](#), 279 U.S. 253, 49 S. Ct. 314, 73 L. Ed. 688 (1929).

3 U.S.—[Mapco Inc. v. Carter](#), 573 F.2d 1268 (Temp. Emer. Ct. App. 1978).

4 U.S.—[Schirtzinger v. Dunlop](#), 489 F.2d 1307 (Temp. Emer. Ct. App. 1973).

5 U.S.—[Getty Oil Co. v. Department of Energy](#), 581 F.2d 838 (Temp. Emer. Ct. App. 1978).

6 Pa.—[Gambone v. Com.](#), 375 Pa. 547, 101 A.2d 634 (1954).

7 U.S.—[Getty Oil Co. v. Department of Energy](#), 581 F.2d 838 (Temp. Emer. Ct. App. 1978).

8 U.S.—[Vidal v. Fernandez](#), 104 F.2d 606 (C.C.A. 1st Cir. 1939).

9 U.S.—[Western States Meat Packers Ass'n, Inc. v. Dunlop](#), 482 F.2d 1401 (Temp. Emer. Ct. App. 1973).

10 U.S.—[Baxley v. Alabama Dairy Commission](#), 360 F. Supp. 1159 (M.D. Ala. 1973).

11 Ala.—[Alabama Dairy Commission v. Baker & Sons Dairy, Inc.](#), 408 So. 2d 98 (Ala. Civ. App. 1981).

12 Ga.—[Ward v. Big Apple Super Markets of Bolton Road, Inc.](#), 223 Ga. 756, 158 S.E.2d 396 (1967).

13 N.C.—[State ex rel. North Carolina Milk Commission v. National Food Stores, Inc.](#), 270 N.C. 323, 154 S.E.2d 548 (1967).

14 Ariz.—[Baseline Liquors v. Circle K Corp.](#), 129 Ariz. 215, 630 P.2d 38, 41 A.L.R.4th 602 (Ct. App. Div. 1 1981).

15 Kan.—[Laird & Co. v. Cheney](#), 196 Kan. 675, 414 P.2d 18 (1966).

16 N.J.—[Heir v. Degnan](#), 82 N.J. 109, 411 A.2d 194 (1980).

17 Ala.—[Simonetti, Inc. v. State ex rel. Gallion](#), 272 Ala. 398, 132 So. 2d 252 (1961).

18 Ga.—[Strickland v. Rio Stores, Inc.](#), 243 Ga. 600, 255 S.E.2d 714 (1979).

19 La.—[Hayden v. Louisiana Public Service Com'n](#), 553 So. 2d 435 (La. 1989).

20 N.J.—[In re 1977 Rate Appeal of Monmouth Medical Center](#), 185 N.J. Super. 20, 447 A.2d 192 (App. Div. 1982).

21 N.Y.—[State v. Strong Oil Co., Inc.](#), 105 Misc. 2d 803, 433 N.Y.S.2d 345 (Sup 1980).

22 Mass.—[Pinnick v. Cleary](#), 360 Mass. 1, 271 N.E.2d 592, 42 A.L.R.3d 194 (1971).

23 Mich.—[Shavers v. Kelley](#), 402 Mich. 554, 267 N.W.2d 72 (1978).

24 N.C.—[State ex rel. Com'r of Ins. v. North Carolina Auto. Rate Administrative Office](#), 292 N.C. 1, 231 S.E.2d 867 (1977).

25 Pa.—[Nationwide Mut. Ins. Co. v. Com.](#), 15 Pa. Commw. 24, 324 A.2d 878 (1974).

26 Ark.—[Quinn-Moore v. Lambert](#), 272 Ark. 324, 614 S.W.2d 230 (1981).

27 Ind.—[Financial Aid Corp. v. Wallace](#), 216 Ind. 114, 23 N.E.2d 472, 125 A.L.R. 736 (1939).

28 U.S.—[Aldens, Inc. v. Miller](#), 610 F.2d 538 (8th Cir. 1979); [Aldens, Inc. v. Ryan](#), 571 F.2d 1159 (10th Cir. 1978).

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

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16D C.J.S. Constitutional Law § 2297

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2297. Taxation, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

The taking of property under the power of taxation, properly exercised, does not constitute a taking without due process of law except where taxing powers are exercised so arbitrarily as to constitute an exercise of the government's confiscation powers.

Because the governmental requirement that one pay tax deprives the payor of property, such a deprivation mandates compliance with due process,¹ and the taking of property under the power of taxation, properly exercised, does not constitute a taking without due process of law² except where taxing powers are exercised so arbitrarily as to constitute, for example, an exercise of the government's confiscation powers.³

The Due Process Clause of the Fourteenth Amendment does not afford protection against taxes which are "unreasonable" or "unduly burdensome,"⁴ or against an inequality of tax burdens.⁵ A tax will ordinarily be held to violate the guarantee of due process only where it proposes, or clearly results in, such a flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation.⁶

Various procedures may be employed by taxing authorities without violating the taxpayer's due process rights.⁷

CUMULATIVE SUPPLEMENT

Cases:

Ultimately, under Due Process Clause, only those who derive benefits and protection from associating with a State should have tax obligations to the State in question. [U.S. Const. Amend. 14. North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 \(2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ga.—[James B. Beam Distilling Co. v. State, 263 Ga. 609, 437 S.E.2d 782 \(1993\)](#).
- 2 U.S.—[Lawrence v. State Tax Commission of Mississippi, 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A.L.R. 374 \(1932\)](#).
Or.—[School Dist. No. 12 of Wasco County v. Wasco County, 270 Or. 622, 529 P.2d 386 \(1974\)](#).
Utah—[State Tax Commission v. Hoopes, 30 Utah 2d 107, 514 P.2d 221 \(1973\)](#).
- 3 U.S.—[Illinois Cent. R. Co. v. State of Minn., 309 U.S. 157, 60 S. Ct. 419, 84 L. Ed. 670 \(1940\)](#); [A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 \(1934\)](#).
Conn.—[Miller v. Heffernan, 173 Conn. 506, 378 A.2d 572 \(1977\)](#).
- 4 U.S.—[Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 \(1981\)](#); [International Harvester Co. v. Wisconsin Department of Taxation, 322 U.S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 \(1944\)](#).
Pa.—[Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 \(1975\)](#).
U.S.—[Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 \(1960\)](#).
- 5 **Unique nature of oil and gas interests**
A state constitutional article and a state rule establishing valuation principles for the taxation of oil and gas reserves under such article did not violate the principles of due process since the unique nature of oil and gas interests not only permitted but also compelled that they be treated differently from other forms of property for taxation purposes.
Cal.—[Lynch v. State Bd. of Equalization, 164 Cal. App. 3d 94, 210 Cal. Rptr. 335 \(3d Dist. 1985\)](#).
As to classifications and exemptions relating to taxation, see §§ 2305, 2306.
- 6 U.S.—[A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 \(1934\)](#).
Conn.—[Miller v. Heffernan, 173 Conn. 506, 378 A.2d 572 \(1977\)](#).
- 7 § 2300.
As to collection and enforcement of income taxes, see § 2334.
As to collection and enforcement of tax laws, generally, see §§ 2319 to 2326.

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2298. Federal taxation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4149

The power of the United States Congress to impose taxes generally is not limited by the Due Process Clause of the Federal Constitution although it applies to a federal tax statute which is so arbitrary and capricious as to amount to a confiscation of property.

The Due Process Clause of the Federal Constitution is not a limitation on the broad power of the United States Congress to impose taxes.¹ The Internal Revenue Code does not violate due process either generally² or because it is arbitrary and vague,³ and where a tax is not imposed in such an arbitrary or capricious manner as to amount to confiscation, there is no violation of the Fifth Amendment.⁴ However, the Due Process Clause is applicable to a federal tax statute which is so arbitrary and capricious as to amount to a confiscation of property.⁵

Due process requires uniform operation of the tax on all subject to it.⁶ The only limitation on the authority of Congress in enacting a tax is that of uniformity in laying the tax, that is, geographical uniformity throughout the United States and not the equal application of the tax to all persons who may come within its operation.⁷

Consistent with due process, Congress may tax not only ownership but also any right or privilege that is a constituent of ownership.⁸ Accordingly, it may impose a tax on capital stock and excess profits,⁹ on undistributed profits,¹⁰ or on personal holding companies.¹¹

Congress may make reasonable classifications of taxpayers¹² or profits to be taxed and deductions to be allowed.¹³ Congress also may make certain exemptions.¹⁴ In addition, Congress may make a tax statute retroactive as to uncompleted transactions.¹⁵

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Footnotes

- 1 U.S.—*Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 36 S. Ct. 236, 60 L. Ed. 493 (1916); *U.S. v. Pownall*, 65 F. Supp. 147 (S.D. Cal. 1946), judgment aff'd, 159 F.2d 73 (C.C.A. 9th Cir. 1947), judgment aff'd, 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948).
- 2 U.S.—*U.S. v. Gamble*, 607 F.2d 820, 51 A.L.R. Fed. 765 (9th Cir. 1979); *Hartman v. Switzer*, 376 F. Supp. 486 (W.D. Pa. 1974).
- 3 U.S.—*Wood v. C. I. R.*, 462 F.2d 691 (5th Cir. 1972).
- 4 U.S.—*Helvering v. National Grocery Co.*, 304 U.S. 282, 58 S. Ct. 932, 82 L. Ed. 1346 (1938); *Sheets v. Commissioner of Internal Revenue*, 95 F.2d 727 (C.C.A. 8th Cir. 1938); *Midvale Paper Board Co. v. U.S.*, 31 F. Supp. 851 (S.D. N.Y. 1940).
- 5 U.S.—*Kentucky Fire Brick Co. v. Glenn*, 34 F. Supp. 35 (W.D. Ky. 1940); *Wyeth v. Crooks*, 33 F.2d 1018 (W.D. Mo. 1928).
- 6 U.S.—*Hornell Ice & Cold Storage Co. v. U.S.*, 32 F. Supp. 468 (W.D. N.Y. 1940).
- 7 U.S.—*Liberty Paper Bd. Co. v. U.S.*, 37 F. Supp. 751 (S.D. Ohio 1941).
- 8 U.S.—*Burnet v. Wells*, 289 U.S. 670, 53 S. Ct. 761, 77 L. Ed. 1439 (1933).
- 9 U.S.—*Helvering v. Lerner Stores Corporation*, 314 U.S. 463, 62 S. Ct. 341, 86 L. Ed. 482 (1941); *Green Spring Dairy v. Commissioner of Internal Rev.*, 208 F.2d 471 (4th Cir. 1953); *Prime Securities Corp. v. U.S.*, 119 F.2d 939 (C.C.A. 6th Cir. 1941).
- 10 U.S.—*Helvering v. Northwest Steel Rolling Mills*, 311 U.S. 46, 61 S. Ct. 109, 85 L. Ed. 29 (1940); *Foley Securities Corporation v. Commissioner of Internal Revenue*, 106 F.2d 731 (C.C.A. 8th Cir. 1939); *Bastian Bros. Co. v. McGowan*, 32 F. Supp. 93 (W.D. N.Y. 1940), judgment aff'd, 113 F.2d 489 (C.C.A. 2d Cir. 1940).
- 11 U.S.—*Morris Inv. Corporation v. Commissioner of Internal Revenue*, 134 F.2d 774 (C.C.A. 3d Cir. 1943); *Foley Securities Corporation v. Commissioner of Internal Revenue*, 106 F.2d 731 (C.C.A. 8th Cir. 1939); *Noteman v. Welch*, 26 F. Supp. 437 (D. Mass. 1939), judgment aff'd, 108 F.2d 206 (C.C.A. 1st Cir. 1939).
- 12 U.S.—*Barclay & Co. v. Edwards*, 267 U.S. 442, 45 S. Ct. 348, 69 L. Ed. 703 (1925); *Morris Inv. Corporation v. Commissioner of Internal Revenue*, 134 F.2d 774 (C.C.A. 3d Cir. 1943); *Liberty Paper Bd. Co. v. U.S.*, 37 F. Supp. 751 (S.D. Ohio 1941).
- 13 As to classifications and exemptions relating to taxation, see §§ 2305, 2306.
- 14 U.S.—*Cohn v. U.S.*, 87 Ct. Cl. 422, 23 F. Supp. 534 (1938).
- 15 U.S.—*Maricopa County, Ariz. v. Valley Nat. Bank of Phoenix*, 318 U.S. 357, 63 S. Ct. 587, 87 L. Ed. 834 (1943).
- 15 U.S.—*Consolidated Utilities Co v. Commissioner of Internal Revenue*, 84 F.2d 548 (C.C.A. 5th Cir. 1936).

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XXII. Particular Applications of Due Process Guaranty

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1. General Considerations

§ 2299. Federal taxation—Audit and summons

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4149

An internal revenue audit or summons does not violate the taxpayer's due process rights.

An Internal Revenue Service (IRS) audit of a taxpayer's tax return does not violate the taxpayer's due process rights.¹ Likewise, an internal revenue summons, which requires a taxpayer to produce certain records, does not violate the taxpayer's due process rights.²

The issuance of a third-party IRS summons, as part of an investigation into potential tax liabilities, does not deprive taxpayers of any property or liberty interest as the summons can be ignored without consequence until it is judicially enforced.³ Thus, the taxpayer is not entitled to notice and a hearing prior to the enforcement of such a summons against the third party.⁴ Compliance with a summons does not impose an unreasonable financial burden on such a party so as to result in a deprivation of property without due process of law.⁵

Requiring a taxpayer to raise the defense of improper service of a summons before a hearing examiner, instead of before the district court, does not result in a denial of due process.⁶

CUMULATIVE SUPPLEMENT

Cases:

Taxpayer, at minimum, constructively violated order enforcing Internal Revenue Service (IRS) administrative summons by failing to produce foreign bank account and corporate documents presumptively within her possession or control, as required to be held in civil contempt; taxpayer did not assert nonpossession defense at enforcement stage, taxpayer was beneficial owner of foreign accounts and had received wire transfers from such accounts, taxpayer had power-of-attorney for one of listed corporations, taxpayer had served as secretary-treasurer for other two listed corporations, and unsworn declaration by taxpayer's attorney contained no information about steps taxpayer had taken to comply with enforcement order. [United v. Ali, 874 F.3d 825 \(4th Cir. 2017\)](#).

Where taxpayer was not identified in Internal Revenue Service (IRS) summons served in connection with investigation of her ex-husband, taxpayer was not entitled to notice under third-party summons statute. [26 U.S.C.A. § 7609\(a\)\(1\)](#). [Byers v. United States Internal Revenue Service, 963 F.3d 548 \(6th Cir. 2020\)](#).

IRS did not make referral of taxpayer's case to Department of Justice (DOJ) for criminal prosecution, as required for enforcement of IRS administrative third-party summonses; mere presence of DOJ attorneys as advocates litigating for enforcement of summonses, or fact that IRS investigated applicability of Internal Revenue Code (IRC) provision barring deductions for business expenses arising from a trade or business consisting of trafficking in controlled substances, did not establish referral. [26 U.S.C.A. §§ 280E, 7602\(d\)](#). [High Desert Relief, Inc. v. United States, 917 F.3d 1170 \(10th Cir. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Kopunek v. Director of Internal Revenue, 528 F. Supp. 134 \(S.D. N.Y. 1981\)](#); [Barnstone v. McKeever, 477 F. Supp. 108 \(S.D. Tex. 1979\)](#).

2 U.S.—[Russell v. U.S., 524 F.2d 1152 \(8th Cir. 1975\)](#); U.S. v. Vetco Inc., 644 F.2d 1324 (9th Cir. 1981), republished at [691 F.2d 1281](#).

3 U.S.—[Mollison v. U.S., 481 F.3d 119 \(2d Cir. 2007\)](#).

Unenforced summons

Disobedience to an IRS summons has no penal consequences until a judge has ordered its enforcement, to keep the scheme consistent with due process, and thus, a taxpayer subject to the order cannot be held in contempt or subjected to indictment for refusing to comply with the original, unenforced IRS summons.

U.S.—[Schulz v. I.R.S., 413 F.3d 297 \(2d Cir. 2005\)](#).

4 U.S.—[U.S. v. Schutterle, 586 F.2d 1201 \(8th Cir. 1978\)](#).

5 U.S.—[U. S. v. Continental Bank & Trust Co., 503 F.2d 45 \(10th Cir. 1974\)](#).

Expenses reasonably incident to normal operations

The Constitution protected a bank only from the imposition of an unreasonable and excessive financial burden, and expenses incurred by the bank in producing records were reasonably incident to bank's normal operations.

U.S.—[U.S. v. Bremicker, 365 F. Supp. 701 \(D. Minn. 1973\)](#).

6 U.S.—[U.S. v. Payne, 648 F.2d 361 \(5th Cir. 1981\)](#).

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1. General Considerations

§ 2300. Procedural due process

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West's Key Number Digest

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Procedural due process requires at a minimum that the taxpayer have both notice of the appeal and the right to participate.

Procedural due process, at a minimum, affords each taxpayer a full hearing and judicial determination at which he or she may raise any and all constitutional objections to the tax; in other words, procedural due process requires at a minimum that the taxpayer have both notice of the appeal and the right to participate.¹ However, due process in the area of taxation does not require the same kind of notice as is required in the case of judicial actions or even in proceedings for taking private property under the power of eminent domain, as the very existence of government necessitates that the tax collection process not be subject to the delays attendant upon formal judicial proceedings.² In the context of administrative penalties for failure to pay a tax, the Due Process Clause's fair warning requirement is satisfied through notice provided by the statute that establishes the obligation to pay the underlying tax.³

The Internal Revenue Service is not required, as a matter of due process, to give an aggrieved taxpayer a hearing before determining that he or she is not entitled to claim an exemption from federal income tax.⁴ However, the failure of internal

revenue agents to fully advise taxpayers of their rights in compliance with a procedure adopted by the IRS deprives taxpayers of due process of law.⁵

The imposition of the burden of persuasion on a taxpayer who brings an action in the tax court challenging a deficiency determination by the Commissioner of Internal Revenue is not a denial of due process.⁶ Due process likewise is not denied by a statute requiring a taxpayer claiming or suing for a refund of an illegal or erroneous tax to show that he or she bore the burden of the tax, as there is nothing arbitrary in a requirement that it be shown or made certain that the money, when refunded, will go to the actual sufferer and real party in interest.⁷

Taxpayers do not have a Fifth Amendment due process entitlement in a collection-due-process hearing to comment on an IRS settlement officer's report or to present their case directly to an appeals official even if the Due Process Clause generally requires the IRS to afford taxpayers some manner of hearing before imposing a levy.⁸

Although an individual's property can be in jeopardy in suits by the government to collect taxes, there is no right to appointed counsel under the Due Process Clause.⁹

CUMULATIVE SUPPLEMENT

Cases:

Application of full-payment rule to require taxpayer to pay all penalties assessed by the Internal Revenue Service (IRS) for failure to report his organization of fraudulent tax shelters as a prerequisite to filing refund action did not deprive taxpayer of procedural due process, notwithstanding that taxpayer was unable to pay the assessed penalties in full, where prepayment review by the IRS Office of Appeals was available, taxpayer obtained substantial reduction in penalties through that prepayment review process, adequate post-payment judicial review was available, and full payment requirement furthered substantial government interest in protecting the public purse. [U.S. Const. Amend. 5; 26 U.S.C.A. § 6707; 28 U.S.C.A. § 1346\(a\)\(1\). Larson v. United States, 888 F.3d 578 \(2d Cir. 2018\).](#)

In deciding whether a taxpayer is entitled to pre-collection judicial review of a tax penalty under the Due Process Clause, the second factor is the risk of an erroneous deprivation of the private interest. [U.S. Const. Amend. 5. Interior Glass Systems, Inc. v. United States, 927 F.3d 1081 \(9th Cir. 2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Berne Corp. v. Government of The Virgin Islands, 51 V.I. 1253, 570 F.3d 130 \(3d Cir. 2009\).](#)

2 Me.—[McNaughton v. Kelsey, 1997 ME 182, 698 A.2d 1049 \(Me. 1997\).](#)

3 U.S.—[Prosser v. C.I.R., 777 F.3d 582 \(2d Cir. 2015\).](#)

4 U.S.—[Cleveland v. C.I.R., 600 F.3d 739 \(7th Cir. 2010\).](#)

5 U.S.—[U.S. v. Maciel, 351 F. Supp. 817 \(D.R.I. 1972\).](#)

6 U.S.—[Rockwell v. C. I. R., 512 F.2d 882 \(9th Cir. 1975\).](#)

7 U.S.—[U.S. v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S. Ct. 443, 78 L. Ed. 859 \(1934\); Fuhrman & Forster Co. v. Commissioner of Internal Revenue, 114 F.2d 863 \(C.C.A. 7th Cir. 1940\); Lindner Packing & Provision Co v. C I R, 118 F.2d 656 \(C.C.A. 10th Cir. 1941\).](#)

8 U.S.—[Kuretski v. C.I.R.](#), 755 F.3d 929 (D.C. Cir. 2014).
9 U.S.—[U.S. v. Saccoccia](#), 564 F.3d 502 (1st Cir. 2009).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2301. Procedural due process—Criminal aspects

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4149

The government may not take information that taxpayers have provided under compulsion and use it outside the tax context to convict them of underlying criminal activity.

The government may constitutionally single out groups that are inherently suspect of criminal activities and impose upon them a special tax and registration requirement.¹ However, consistent with the Fifth Amendment, the government may not take the information that such taxpayers have provided under compulsion and use it outside the tax context to convict them of underlying criminal activity.²

It is a violation of a taxpayer's due process rights for a court to issue a contempt certification where the court has not followed the contempt procedure but instead issues a written order, and the taxpayer has no notice of the possible sanctions until they are imposed.³

Footnotes

1 U.S.—[U.S. v. Brian](#), 507 F. Supp. 761 (D.R.I. 1981), aff'd, [700 F.2d 1](#), 12 Fed. R. Evid. Serv. 545 (1st Cir. 1983).

2 U.S.—[U.S. v. Brian](#), 507 F. Supp. 761 (D.R.I. 1981), aff'd, [700 F.2d 1](#), 12 Fed. R. Evid. Serv. 545 (1st Cir. 1983).

Failure to advise of uses of forms

Due process requires that a taxpayer have notice, by statute or by an appropriate regulation duly promulgated thereunder, of the uses to which forms may be put before he or she may be prosecuted for a felony in connection therewith.

U.S.—[U.S. v. Levy](#), 533 F.2d 969 (5th Cir. 1976).

3 U.S.—[U.S. v. Melot](#), 768 F.3d 1082 (10th Cir. 2014).

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16D C.J.S. Constitutional Law § 2302

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2302. Valid purpose of tax

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

The Due Process Clause demands that there exist a rational relationship between a tax and the values connected with the taxing state.

The Due Process Clause demands that there exist a rational relationship between a tax and the values connected with the taxing state.¹

To be valid under constitutional due process requirements, taxation must have a public purpose.² However, the requirements of due process allow the exercise of broad legislative discretion in determining what expenditures will serve the public interest,³ and it is not a due process requirement that there be a reasonable relationship between the amount of taxes collected from a particular activity and the governmental services provided for it.⁴

The public purposes of a state for which it may raise funds by taxation embrace expenditures for its general welfare⁵ or the personal protection of its citizens⁶ and are identical with the purposes for which the government may contract debts or make

appropriations.⁷ Among uses which are public and, therefore, not objectionable as depriving the taxpayer of property without due process of law are education,⁸ including the maintenance of schools generally,⁹ the construction and maintenance of public roads and highways,¹⁰ including bridges,¹¹ construction of public buildings,¹² stadium operation,¹³ and the construction of a municipal airport.¹⁴ Other purposes which are not objectionable include equalizing and lowering taxes across state lines,¹⁵ payment of tort claims brought against the state,¹⁶ issuance of municipal bonds to finance industrial projects,¹⁷ and the extinguishment of judgment debts resulting from default on county bonds.¹⁸

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Footnotes

1 U.S.—*MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008).

2 U.S.—*Green v. Frazier*, 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878 (1920).
Ill.—*People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 11 Ill. Dec. 307, 368 N.E.2d 915 (1977).
Iowa—*Frost v. State*, 172 N.W.2d 575 (Iowa 1969).

3 N.Y.—*James Square Associates LP v. Mullen*, 21 N.Y.3d 233, 970 N.Y.S.2d 888, 993 N.E.2d 374 (2013) (the State failed to set forth a valid public purpose for the retroactive application of tax amendments).

4 U.S.—*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327 (1937).
Ill.—*People ex rel. Toman v. Advance Heating Co.*, 376 Ill. 158, 33 N.E.2d 206 (1941).

5 Neb.—*Sandberg v. State*, 188 Neb. 335, 196 N.W.2d 501 (1972).

6 U.S.—*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981).

7 U.S.—*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327 (1937).

8 Ala.—*Beeland Wholesale Co. v. Kaufman*, 234 Ala. 249, 174 So. 516 (1937).

9 Ind.—*State ex rel. Jackson v. Middleton*, 215 Ind. 219, 20 N.E.2d 509 (1939).

10 Mont.—*State ex rel. Woodahl v. Straub*, 164 Mont. 141, 520 P.2d 776 (1974).

11 U.S.—*Lafayette Steel Co. v. City of Dearborn*, 360 F. Supp. 1127 (E.D. Mich. 1973).

12 U.S.—*Memphis & C. Ry. Co. v. Pace*, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315, 72 A.L.R. 1096 (1931).
Iowa—*Frost v. State*, 172 N.W.2d 575 (Iowa 1969).

13 **Maintenance of private road**
Taxing persons with a right-of-way for a municipality's maintenance of a private road against their will would violate due process.

14 Me.—*Opinion of the Justices of the Supreme Judicial Court*, 560 A.2d 552 (Me. 1989).

15 Iowa—*Frost v. State*, 172 N.W.2d 575 (Iowa 1969).

16 Okla.—*Lone Star Gas Co. v. Bryan County Excise Bd.*, 1943 OK 228, 193 Okla. 13, 141 P.2d 83 (1943).

17 La.—*Martin v. Louisiana Stadium and Exposition Dist.*, 349 So. 2d 349 (La. Ct. App. 4th Cir. 1977).

18 N.C.—*Turner v. City of Reidsville*, 224 N.C. 42, 29 S.E.2d 211 (1944).

19 Alaska—*Premera Blue Cross v. State, Dept. of Commerce, Community & Economic Development, Div. of Ins.*, 171 P.3d 1110 (Alaska 2007) (an Alaska retaliatory tax statute, which substituted the general tax laws of a foreign insurer's home state for the general tax laws of Alaska when the general tax laws of the home state were more burdensome, did not violate the due process rights of a Washington nonprofit hospital and medical services corporation which was doing business in Alaska).

20 Iowa—*Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966).

21 Ill.—*People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

22 Tex.—*Delta County Levee Imp. Dist. No. 2 v. Leonard*, 559 S.W.2d 387 (Tex. Civ. App. Texarkana 1977), writ refused n.r.e., (Mar. 29, 1978).

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16D C.J.S. Constitutional Law § 2303

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2303. Valid purpose of tax—Government competition with private sector

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

A state may constitutionally engage in a business commonly carried on by private enterprise, levy taxes to support it, and compete with private interests engaged in a like activity.

A state may constitutionally engage in a business commonly carried on by private enterprise, levy taxes to support it, and compete with private interests engaged in a like activity.¹ The Due Process Clause of the Fourteenth Amendment does not demand or permit judicial oversight of the terms and circumstances under which the government or its tax exempt instrumentalities may undertake to compete with the private sector.² Thus, a tax may not be stricken as too burdensome where the taxing authority, directly or through an instrumentality, enjoys various forms of tax exemption and competes with a taxpayer in a manner thought to be unfair by the judiciary.³ Due process is also not violated by the exemption from taxation of private property leased to a state.⁴

Footnotes

1 U.S.—[Puget Sound Power & Light Co. v. City of Seattle, Wash., 291 U.S. 619, 54 S. Ct. 542, 78 L. Ed. 1025 \(1934\)](#).

2 U.S.—[City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 94 S. Ct. 2291, 41 L. Ed. 2d 132 \(1974\)](#).

3 U.S.—[City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 94 S. Ct. 2291, 41 L. Ed. 2d 132 \(1974\)](#).

4 S.C.—[Morgan v. Watts, 255 S.C. 212, 178 S.E.2d 147 \(1970\)](#).

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16D C.J.S. Constitutional Law § 2304

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2304. Allocation of taxes collected

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

A taxpayer is not denied due process merely because he or she does not benefit from revenues raised by taxes to the same extent as other taxpayers similarly situated, although where the benefit received and the burden imposed are palpably disproportionate, a tax is a taking without due process.

A taxpayer is not denied due process merely because he or she does not benefit from revenues raised by taxes to the same extent as other taxpayers similarly situated.¹ Although, the Due Process Clause of the Fourteenth Amendment does not require that the tax being levied be directly related to specific benefits received by the taxpayer,² where the benefit received and the burden imposed are palpably disproportionate, a tax is a taking without due process.³ In general, due process requires that local taxes operate fairly so as not to discriminate, for example by subjecting businesses to a tax that is not fairly apportioned to reflect the percentage of the business actually taking place within the taxing jurisdiction.⁴

Any equitable apportionment of taxes collected is generally within the province of the legislature and cannot be said to be without due process of law.⁵ Due process is not violated by using taxes collected in one taxing district for the refund of taxes

levied and spent by other districts,⁶ by providing for the allocation of certain revenues to the school districts of one county only,⁷ or by using local taxes to support schools in another school district.⁸ Similarly, due process is not denied by reciprocal contracts between school districts providing for the appropriation of local taxes for the education of school children belonging in each other's district,⁹ or by a statute authorizing the tax commission to order a political subdivision to refund taxes properly collectable by another subdivision, without granting a hearing thereon.¹⁰

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Footnotes

1 Ga.—[Decatur Tax Payers League, Inc. v. Adams](#), 236 Ga. 871, 226 S.E.2d 69 (1976).

2 Conn.—[Windham First Taxing Dist. v. Town of Windham](#), 208 Conn. 543, 546 A.2d 226 (1988).

3 Pa.—[Bold Corp. v. County of Lancaster](#), 569 Pa. 107, 801 A.2d 469 (2002).

4 Cal.—[Ventas Finance I, LLC v. California Franchise Tax Bd.](#), 165 Cal. App. 4th 1207, 81 Cal. Rptr. 3d 823 (1st Dist. 2008).

5 Kan.—[Kansas City v. Stewart](#), 90 Kan. 846, 136 P. 241 (1913), on reh'g, 92 Kan. 406, 140 P. 876 (1914).
Wis.—[State v. Becker](#), 194 Wis. 464, 215 N.W. 902 (1927).

6 As to the apportionment of taxes on out-of-state activities, see §§ 2312, 2313.

7 Or.—[School Dist. No. 12 of Wasco County v. Wasco County](#), 270 Or. 622, 529 P.2d 386 (1974).

8 N.Y.—[Buchanan v. Town of Salina](#), 270 A.D. 207, 58 N.Y.S.2d 797 (4th Dep't 1945).

9 Wis.—[Buse v. Smith](#), 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

10 Ga.—[Snipes v. Anderson](#), 179 Ga. 251, 175 S.E. 650 (1934).
Wis.—[State ex rel. Town of Greenfield v. Conway](#), 221 Wis. 369, 266 N.W. 907 (1936).

Procedural due process provided

A statute providing for ad valorem tax refunds by a county, even though the tax in question was levied by and for the benefit of a single taxing district, thus imposing a burden on nonbenefited districts, did not deny procedural due process to the nonbenefited districts, even though there was no notice, hearing, or opportunity to object concerning the contribution of their tax money to the refund, since there was an opportunity to appear and be heard at the time of the budget consideration.

Or.—[School Dist. No. 12 of Wasco County v. Wasco County](#), 270 Or. 622, 529 P.2d 386 (1974).

16D C.J.S. Constitutional Law § 2305

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2305. Classifications

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

Reasonable classifications, for purposes of taxation and the imposition of different rates on different classes of taxable subjects, do not constitute a denial of due process.

Constitutional due process protections impose no rule of equality either under the Fifth Amendment¹ or under the Fourteenth Amendment² of the United States Constitution and do not prohibit the flexibility and variety which is appropriate to schemes of taxation.³ Due process protections, therefore, are not violated by inequalities which result from the freedom of legislatures to select the subjects of taxation and to grant exemptions.⁴ Reasonable classifications, for purposes of taxation and the imposition of different rates on different classes of taxable subjects, do not constitute a denial of due process⁵ provided that the taxable subjects within a particular class are taxed on a uniform basis.⁶

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Footnotes

1 U.S.—[Neuss, Hesslein & Co. v. Edwards](#), 30 F.2d 620 (C.C.A. 2d Cir. 1929).
2 Cal.—[Morning Star Co. v. Board of Equalization](#), 201 Cal. App. 4th 737, 135 Cal. Rptr. 3d 457 (3d Dist. 2011).
Conn.—[New Haven Metal & Heating Supply Co. v. Danaher](#), 128 Conn. 213, 21 A.2d 383 (1941).
Or.—[Wittenberg v. Mutton](#), 203 Or. 438, 280 P.2d 359 (1955).
3 U.S.—[Ohio Oil Co. v. Conway](#), 281 U.S. 146, 50 S. Ct. 310, 74 L. Ed. 775 (1930).
4 U.S.—[Carmichael v. Southern Coal & Coke Co.](#), 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327 (1937).
Cal.—[City of San Mateo v. Mullin](#), 59 Cal. App. 2d 652, 139 P.2d 351 (1st Dist. 1943).
Minn.—[Hassler v. Engberg](#), 233 Minn. 487, 48 N.W.2d 343 (1951).

Urban blight elimination

Due process was not offended by taxing taxpayers residing in parts of a tax district outside the area of a municipality at a greater rate and differently from taxpayers residing in districts which were not participating in a tax increment allocation plan where the classifications were based on the need to eliminate or prevent urban blight within each taxing district and only that part of the taxing district which would enjoy an increase in revenues as a result of the redevelopment was required to turn over revenue to the municipality.

Ill.—[People ex rel. City of Canton v. Crouch](#), 79 Ill. 2d 356, 38 Ill. Dec. 154, 403 N.E.2d 242 (1980).

As to equal protection with respect to taxation, see §§ 1507 to 1523.

5 U.S.—[Madden v. Commonwealth of Kentucky](#), 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590, 125 A.L.R. 1383 (1940); [Rogers v. Miller](#), 401 F. Supp. 826 (E.D. Va. 1975).

Ind.—[Indiana Aeronautics Commission v. Ambassadair, Inc.](#), 267 Ind. 137, 368 N.E.2d 1340 (1977).

Wash.—[Sator v. State Dept. of Revenue](#), 89 Wash. 2d 338, 572 P.2d 1094 (1977).

Intangibles

The separate classification of intangible property for ad valorem taxation, with the imposition of a limited rate thereon, was valid and not violative of due process.

Fla.—[Just Valuation & Taxation League, Inc. v. Simpson](#), 209 So. 2d 229 (Fla. 1968).

6 La.—[Bussie v. Long](#), 286 So. 2d 689 (La. Ct. App. 1st Cir. 1973), writ refused, 288 So. 2d 354 (La. 1974).

Mont.—[Department of Revenue v. State Tax Appeal Bd.](#), 188 Mont. 244, 613 P.2d 691 (1980).

N.M.—[Kaiser Steel Corp. v. Revenue Division, Taxation and Revenue Dept.](#), 96 N.M. 117, 1981-NMCA-042, 628 P.2d 687 (Ct. App. 1981).

Establishment of discrimination

To establish discrimination in violation of the Due Process Clause, a taxpayer must show discrimination based on differences of religion, race, politics, or an unacceptable classification.

U.S.—[Christian Echoes Nat. Ministry, Inc. v. U.S.](#), 470 F.2d 849 (10th Cir. 1972).

16D C.J.S. Constitutional Law § 2306

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2306. Classifications—Exemptions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

A state is not prevented by the due process provisions of the Federal Constitution from granting exemptions from taxation.

A state is not prevented by the due process provisions of the Federal Constitution from granting exemptions from taxation,¹ or from declaring the conditions for their enjoyment,² even though the burden of taxation is transferred by the exemption from the exempted parties to other taxpayers.³ However, in order to comply with due process requirements, an exemption must bear a rational relationship to the purpose of the relevant legislation⁴ and must not invidiously discriminate against any identifiable group.⁵

Procedurally, the denial of an exemption may require compliance with due process where there is a strong likelihood that the party claiming the exemption is entitled to it.⁶ Furthermore, an exemption previously granted generally may not be invalidated without notice and a hearing in compliance with due process requirements.⁷ On the other hand, where an abatement of taxation

is not a matter of entitlement but one of administrative discretion, due process need not be provided, and ascertainable standards for the determination of who will receive an abatement, although helpful, are not constitutionally mandated.⁸

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Footnotes

1 U.S.—[Carmichael v. Southern Coal & Coke Co.](#), 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327 (1937); [Ohio Oil Co. v. Conway](#), 281 U.S. 146, 50 S. Ct. 310, 74 L. Ed. 775 (1930).

Limitations on legislature's power to exempt property

The legislature is limited in its power to exempt property from taxation only by a state constitutional requirement to exempt via statute and by the requirement to impose taxation in a manner which does not violate the constitutional guarantees of equal protection and due process of law.

Mont.—[Powder River County v. State](#), 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002).

2 Ga.—[Duncan v. Proctor](#), 195 Ga. 499, 24 S.E.2d 791 (1943).

Mass.—[Massachusetts General Hospital v. Inhabitants of Belmont](#), 233 Mass. 190, 124 N.E. 21 (1919).

Exemption not deprivation of town's right to tax revenue

A town failed to demonstrate it had a legally protected property interest in property tax revenues that required an adjudicative hearing before the Department of Environmental Services on a landfill operator's application for a pollution control property tax exemption, to satisfy the town's due process rights under the state constitution, if any, given that the town's ability to assess or collect taxes was derived from legislative authorization.

N.H.—[In re Town of Bethlehem](#), 154 N.H. 314, 911 A.2d 1 (2006).

Termination of tax exemptions

A statute which permits local governments to terminate tax exemptions for nonprofit organizations, other than those conducted exclusively for religious, educational, charitable, hospital or cemetery purposes, does not violate the Due Process Clause.

N.Y.—[American Bible Soc. v. Lewisohn](#), 48 A.D.2d 308, 369 N.Y.S.2d 725 (1st Dep't 1975), order aff'd, 40 N.Y.2d 78, 386 N.Y.S.2d 49, 351 N.E.2d 697 (1976).

3 Ill.—[People ex rel. County Collector of Cook County v. Northwestern University](#), 51 Ill. 2d 131, 281 N.E.2d 334 (1972).

4 Kan.—[State ex rel. Tomasic v. Kansas City](#), 230 Kan. 19, 630 P.2d 692 (1981), on reh'g, 230 Kan. 404, 636 P.2d 760 (1981).

Homestead exemption

Ga.—[Blevins v. Dade County Bd. of Tax Assessors](#), 288 Ga. 113, 702 S.E.2d 145 (2010).

5 U.S.—[Action Alliance for Senior Citizens of Greater Philadelphia v. Shapp](#), 400 F. Supp. 1208 (E.D. Pa. 1975).

6 U.S.—[Bronson v. Consolidated Edison Co. of New York, Inc.](#), 350 F. Supp. 443 (S.D. N.Y. 1972).

Veterans' exemption denial

Placing the burden on the taxpayer of persuading the assessor or the court that he fell outside a class denied a class exemption, due to the political advocacy of its members, violated due process.

U.S.—[Prince v. City and County of San Francisco](#), 358 U.S. 860, 79 S. Ct. 13, 3 L. Ed. 2d 95 (1958); [Speiser v. Randall](#), 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

Homestead exemption

Fla.—[Horne v. Markham](#), 288 So. 2d 196 (Fla. 1973).

7 Fla.—[Hollywood Jaycees v. State, Dept. of Revenue](#), 306 So. 2d 109 (Fla. 1974).

Failure to notify not violative of due process

The failure to satisfy the notice requirement does not deprive courts of subject matter jurisdiction, as the key issue is whether the taxpayer is afforded due process so that the taxpayer has the opportunity to protest a tax decision, and if the taxpayer is given the opportunity to be heard before the appraisal board at some stage of the proceedings, then the requirements of due process are satisfied.

Tex.—[Harris County Appraisal Dist. v. Pasadena Property, LP](#), 197 S.W.3d 402 (Tex. App. Eastland 2006).

8 Mass.—[Allen v. Board of Assessors of Granby](#), 387 Mass. 117, 439 N.E.2d 231 (1982).

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16D C.J.S. Constitutional Law § 2307

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2307. Retroactive taxes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4138(1)

Retroactive taxes do not necessarily violate due process of law except where a taxpayer has no warning and no opportunity to alter behavior in anticipation of the impact of any retroactive amendment.

The retroactive operation of a tax statute does not, *per se*, violate the due process rights of taxpayers adversely affected thereby.¹ The due process standard to be applied to tax statutes with retroactive effect is the same as that generally applicable to retroactive economic legislation;² thus, provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.³

Retroactive taxes thus do not necessarily violate due process of law,⁴ as where the retroactivity of the tax does not upset a taxpayer's reasonable reliance on previously existing law,⁵ or where the imposition of a tax on a previously nontaxable transaction has been expected.⁶ However, the period of retroactivity may not reach so far back as to be oppressive.⁷

Where a taxpayer has no warning and no opportunity to alter behavior in anticipation of the impact of amendments introducing new criteria that the taxpayer is required to meet to retain eligibility for a tax credit, and the taxpayer conducts its affairs in a manner consistent with the existing requirements, justifiably relying on the receipt of tax benefits in effect, the taxpayer's due process rights have been violated.⁸ Moreover, where the period of retroactivity is long enough to give the taxpayer a reasonable expectation that it would secure repose in the existing tax scheme, amending the tax scheme and imposing retroactive liability is a violation of due process.⁹

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Footnotes

1 Conn.—[Gunther v. Dubno](#), 195 Conn. 284, 487 A.2d 1080 (1985).

2 Iowa—[Zaber v. City of Dubuque](#), 789 N.W.2d 634 (Iowa 2010).

3 Wash.—[In re Estate of Hambleton](#), 181 Wash. 2d 802, 335 P.3d 398 (2014).

4 Iowa—[Zaber v. City of Dubuque](#), 789 N.W.2d 634 (Iowa 2010).

U.S.—[Welch v. Henry](#), 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87, 118 A.L.R. 1142 (1938).

Retroactive assessment

Whether retroactive assessment of taxpayers who were taxed at a preferential rate satisfies due process requirements depends on the ability of the state to administer and enforce retroactive assessments in a timely and thorough manner.

Haw.—[Matter of Hawaiian Flour Mills, Inc.](#), 76 Haw. 1, 868 P.2d 419 (1994).

5 N.Y.—[Neuner v. Weyant](#), 63 A.D.2d 290, 408 N.Y.S.2d 89 (2d Dep't 1978).

6 U.S.—[First Nat. Bank in Dallas v. U. S.](#), 190 Ct. Cl. 400, 420 F.2d 725 (1970).

No claim of surprise warranted

An unincorporated business tax and amendment creating a fourth basis for the imposition of corporate income tax were not new, and therefore retroactive imposition of taxes on transactions occurring six months before the statute's effective date did not violate due process, as the taxpayers could not claim surprise at the imposition of these taxes.

Conn.—[Gunther v. Dubno](#), 195 Conn. 284, 487 A.2d 1080 (1985).

7 Mass.—[Keniston v. Board of Assessors of Boston](#), 380 Mass. 888, 407 N.E.2d 1275 (1980).

8 N.Y.—[James Square Associates LP v. Mullen](#), 21 N.Y.3d 233, 970 N.Y.S.2d 888, 993 N.E.2d 374 (2013).

9 N.Y.—[James Square Associates LP v. Mullen](#), 21 N.Y.3d 233, 970 N.Y.S.2d 888, 993 N.E.2d 374 (2013) (16- to 32-month period of retroactivity).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2308. Remedies for improperly exacted taxes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137, 4149

The exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, but while due process obligates a state to afford a meaningful remedy for improperly exacted taxes, no particular remedy is mandated.

The exaction by a state of a tax which it is without power to impose is a taking of property without due process of law.¹ However, a tax refund is generally not merited, pursuant to the Due Process Clause, when there has been no actual injury.²

A state must provide procedural safeguards against unlawful tax exactions in order to satisfy the commands of due process.³ Thus, for example, once a state's tax statute is held invalid, the State is obligated to provide relief consistent with federal due process principles.⁴

While due process obligates a state to afford a meaningful remedy for improperly exacted taxes, no particular remedy is mandated.⁵

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Footnotes

1 Me.—[Metcalf v. State Tax Assessor](#), 2013 ME 62, 70 A.3d 261 (Me. 2013).
Use of funds irrelevant
City residents who had paid a city's franchise fees for gas and electric power services, which were illegally excessive taxes, had a due process right to a refund, even if the funds received from the illegal taxation were used wisely, legally, and with the best intentions for city residents.
Iowa—[Kragne v. City of Des Moines](#), 810 N.W.2d 492 (Iowa 2012).
Amount of tax paid irrelevant
City residents who had paid a city's franchise fees for gas and electric power services, which were illegally excessive taxes, had a due process right to a refund even if some residents would not have paid less if the city had raised the same amount of revenue through property taxes.
Iowa—[Kragne v. City of Des Moines](#), 810 N.W.2d 492 (Iowa 2012).
2 Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014) (a party injured by a dormant Commerce Clause violation must actually have a competitor who benefited from the discriminatory tax scheme for the injured party to merit a monetary remedy).
3 U.S.—[McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida](#), 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990).
Iowa—[Kragne v. City of Des Moines](#), 810 N.W.2d 492 (Iowa 2012).
Miss.—[Mississippi Dept. of Revenue v. AT & T Corp.](#), 101 So. 3d 1139 (Miss. 2012).
Denial of recovery of taxes in contravention of Fourteenth Amendment
Denial by a state court of the recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment, the sovereign immunity states traditionally enjoy in their own courts notwithstanding.
U.S.—[Reich v. Collins](#), 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994).
4 U.S.—[American Trucking Associations, Inc. v. Smith](#), 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990).
5 Vt.—[Williams v. State](#), 156 Vt. 42, 589 A.2d 840 (1990).

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16D C.J.S. Constitutional Law § 2309

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

1. General Considerations

§ 2309. Remedies for improperly exacted taxes—Timing of hearing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137, 4149

A state may maintain an exclusively predeprivation remedial scheme, exclusively postdeprivation remedial scheme, or a hybrid regime to satisfy the due process requirement of permitting the recovery of taxes exacted in violation of the laws or the Constitution of the United States.

A state may maintain an exclusively predeprivation remedial scheme, exclusively postdeprivation remedial scheme, or a hybrid regime to satisfy the due process requirement of permitting the recovery of taxes exacted in violation of the laws or the Constitution of the United States.¹

A meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing constitutes a procedural safeguard sufficient, by itself, to satisfy due process.² However, if no predeprivation remedy exists, the Due Process Clause obligates a state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation in discriminatory taxation.³ When a state penalizes taxpayers for the failure to remit taxes in a timely fashion, thus requiring them to pay first before obtaining review of a tax's validity, federal due process principles require that postdeprivation procedures provide a clear and certain remedy for the deprivation of tax moneys in an unconstitutional manner,⁴ ranging from

a refund of excess taxes paid to offsetting a charge to previously favored taxpayers, that would cure any unconstitutional discrimination during the contested tax period.⁵ The clear and certain remedy that must be provided for an erroneous or unlawful tax collection is not, as matter of constitutional necessity, a plenary suit in a court of general jurisdiction, and due process does not prevent a state from requiring exhaustion of administrative remedies before judicial intervention into a state tax matter.⁶ Similarly, a state may, consistent with due process, impose a requirement that refunds for an unconstitutional tax will be available only for those complying with a statutorily prescribed protest procedure.⁷

A state is free to reconfigure, over time, its remedial scheme for allowing recovery of taxes exacted in violation of the laws or the United States Constitution, to fit its changing needs.⁸ However, a state may not reconfigure its scheme, unfairly, in midcourse.⁹ Under the Due Process Clause, a state may not hold out what appears to be a plain and certain postdeprivation remedy and then declare, only after the disputed taxes are paid, that no such remedy exists.¹⁰

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Footnotes

1 U.S.—[Reich v. Collins](#), 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994).

Flexibility in determining relief mechanisms

Under the Due Process Clause, a state found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination.

U.S.—[Harper v. Virginia Dept. of Taxation](#), 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

2 U.S.—[Harper v. Virginia Dept. of Taxation](#), 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

3 U.S.—[Harper v. Virginia Dept. of Taxation](#), 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014).

4 U.S.—[McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida](#), 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990).

Miss.—[Akins v. Mississippi Dept. of Revenue](#), 70 So. 3d 204 (Miss. 2011).

Tenn.—[Waters v. Farr](#), 291 S.W.3d 873 (Tenn. 2009).

Vt.—[Stone v. Errecart](#), 165 Vt. 1, 675 A.2d 1322 (1996).

Requirement of permission to sue for refund unconstitutional

Due process is denied by a statute which provides that, before claiming a refund, a taxpayer must obtain legislative permission to sue the State, where no opportunity is afforded the taxpayer, at some stage of the proceeding, to contest the imposition of the tax.

Tex.—[Querner Truck Lines, Inc. v. State](#), 610 S.W.2d 533 (Tex. Civ. App. San Antonio 1980), writ refused n.r.e., 615 S.W.2d 176 (Tex. 1981).

5 U.S.—[McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida](#), 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990).

Remedy where competitors are unfairly exempted from tax

As required by due process, meaningful backward-looking relief operates to place a taxpayer who has suffered an unconstitutional deprivation in the same position as its competitors who were favored by a corresponding, but unlawful, tax exemption; such relief may take various forms, including refunding the difference between the tax paid by the claimant and the tax that would have been assessed had the claimant been granted the unlawful exemption, the assessment of taxes against those who had previously been favored by the exemption to put them on equal footing with those who had been discriminated against, or a combination of a partial refund and a partial retroactive assessment.

Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014).

6 Vt.—[Stone v. Errecart](#), 165 Vt. 1, 675 A.2d 1322 (1996).

7 Okla.—[Stallings v. Oklahoma Tax Com'n](#), 1994 OK 99, 880 P.2d 912 (Okla. 1994).

8 U.S.—[Reich v. Collins](#), 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994).

9 U.S.—[Reich v. Collins](#), 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994).

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

2. Taxing Jurisdiction

§ 2310. Minimum contacts and situs requirements

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

The Due Process Clause demands that there exist some definite link, some minimum connection, between the taxing state and the person, property, or transaction that it seeks to tax.

The Due Process Clause demands that there exist some definite link, some minimum connection, between the taxing state and the person, property, or transaction that it seeks to tax.¹ The presence of a corporation outside or within the state of its origin, for purposes of taxation, can be manifested only by activities carried on in the corporation's behalf by those who are authorized to act for it.²

The Due Process Clause prohibits a state from taxing property unless that property has acquired a tax situs in that state.³ In regard to tangible personal property, the state of domicile retains jurisdiction to tax such property that has not acquired an actual situs elsewhere.⁴ Until personal property has acquired another tax situs, it is appropriate to assume the domicile is the only state affording the opportunities, benefits, or protection which due process demands; thus, the domicile retains the power to tax since the property otherwise would escape taxation altogether.⁵

CUMULATIVE SUPPLEMENT

Cases:

A two-step analysis applies to decide if a state tax abides by the Due Process Clause; first, there must be some definite link, some minimum connection, between the State and the person, property, or transaction it seeks to tax, and second, the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State. [U.S. Const. Amend. 14. North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 \(2019\)](#).

To determine whether a State has the requisite minimum connection with the object of its tax, so as to satisfy Due Process Clause, the Supreme Court borrows from the familiar *International Shoe* test; the State has the power to impose a tax only when the taxed entity has certain minimum contacts with the State such that the tax does not offend traditional notions of fair play and substantial justice. [U.S. Const. Amend. 14. North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 \(2019\)](#).

The requirement under the Commerce Clause that a seller must have a substantial nexus with the taxing State in order to be required to collect sales tax is closely related to the due process requirement that there be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax. [U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const. Amend. 14. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 \(2018\)](#).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 \(2008\)](#); [Red Earth LLC v. U.S., 657 F.3d 138 \(2d Cir. 2011\)](#); [Fond du Lac Band of Lake Superior Chippewa v. Frans, 649 F.3d 849 \(8th Cir. 2011\)](#); [Gordon v. Holder, 721 F.3d 638 \(D.C. Cir. 2013\)](#). Ill.—[Irwin Indus. Tool Co. v. Illinois Dept. of Revenue, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 \(2010\)](#). Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury, 437 Md. 492, 87 A.3d 1263 \(2014\)](#). Mass.—[Capital One Bank v. Commissioner of Revenue, 453 Mass. 1, 899 N.E.2d 76 \(2009\)](#). Pa.—[Wirth v. Com., 95 A.3d 822 \(Pa. 2014\)](#), cert. denied, [135 S. Ct. 1405 \(2015\)](#).

Online retailer

An online retailer of tobacco products had sufficient contact with the states in which it did business to render it subject to taxation in the states where it did business, where the retailer did business over the Internet in all 50 states, and its website did more than post information or exchange information, as customers could place orders over the Internet, pay for the products over the Internet, and have those products delivered to the states in which they lived.

U.S.—[Musser's Inc. v. U.S., 1 F. Supp. 3d 308 \(E.D. Pa. 2014\)](#).

Single employee in jurisdiction

A foreign corporation that had a single employee who telecommuted from New Jersey, where she resided, had sufficient minimum connection with New Jersey to permit taxation consistent with the Due Process Clause where the employee produced computer code for a corporation in New Jersey, she was entitled to all of the legal protections New Jersey provided to its residents, and should the employee violate the restrictive covenants in her employment contract, the corporation could file suit to enforce the contract in New Jersey's courts.

N.J.—[Telebright Corp., Inc. v. Director, New Jersey Div. of Taxation, 424 N.J. Super. 384, 38 A.3d 604 \(App. Div. 2012\)](#).

2 U.S.—[International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 \(1945\)](#).

3 U.S.—[Sanford v. Poe \(U.S. Reports Title: Adams Express Company v. Ohio State Auditor\), 165 U.S. 194, 17 S. Ct. 305, 41 L. Ed. 683 \(1897\)](#).

Ind.—[Gross Income Tax Division v. Bartlett, 228 Ind. 505, 93 N.E.2d 174 \(1950\)](#).

Wash.—[Flight Options, LLC v. State, Dept. of Revenue, 172 Wash. 2d 487, 259 P.3d 234 \(2011\)](#).

Property held in customs-bonded warehouse

Due process was not violated by the imposition of a state ad valorem property tax on imported tobacco held in a customs-bonded warehouse, prior to domestic manufacture and sale, in view of the police, fire, and other services provided by the counties and cities even though the tobacco was "in transit" because it was in a customs-bonded warehouse.

U.S.—[R.J. Reynolds Tobacco Co. v. Durham County, N.C., 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 \(1986\)](#).

4 U.S.—[Central R. Co. of Pa. v. Com. of Pa., 370 U.S. 607, 82 S. Ct. 1297, 8 L. Ed. 2d 720 \(1962\)](#).

Acquisition of tax situs in state

A company had habitually entered the state with airplanes the company operated such that the State Department of Revenue, consistent with due process, could treat the airplanes as having acquired a tax situs in the state, even though the airplanes did not operate over fixed routes or on regular schedules, where the company's airplanes averaged two visits to the state each day.

Wash.—[Flight Options, LLC v. State, Dept. of Revenue, 172 Wash. 2d 487, 259 P.3d 234 \(2011\)](#).

5 Mo.—[Johnson v. Otey, 299 S.W.3d 308 \(Mo. Ct. App. S.D. 2009\)](#).

16D C.J.S. Constitutional Law § 2311

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

2. Taxing Jurisdiction

§ 2311. Minimum contacts and situs requirements—Intangible property

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

The general rule that a state may not tax a resident for property having a permanent situs beyond its boundaries has no application to intangible property even though the property is also taxable in another state by virtue of having acquired a business situs there.

The general rule that a state may not tax a resident for property having a permanent situs beyond its boundaries has no application to intangible property even though the property is also taxable in another state by virtue of having acquired a business situs there.¹ Thus, intangible personal property may be subject to taxation irrespective of whether such property is taxed in other states.² Moreover, intangibles which have become integral parts of some local business may be taxed at their business situs notwithstanding the fact that the domicile of their owner is elsewhere.³

The Due Process Clause requires some definite link, or minimum connection, between the state and the person, property, or transaction it seeks to tax.⁴ Where a taxpayer is not domiciled in the state, either legally or commercially, and the taxpayer's intangibles have no actual business situs in the state, taxes imposed on such intangibles are invalid.⁵

The Due Process Clause of the Fifth Amendment does not require the fixing of a single exclusive place of taxation of intangibles for the benefit of their foreign owner, and the same is true as to the Fourteenth Amendment.⁶ However, a state may fix the situs of intangible property owned by a resident of the state, even though it is managed and controlled by a trustee in another state, where the property is not taxed in such other state.⁷

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Footnotes

1 U.S.—[Cream of Wheat Co. v. Grand Forks County](#), N.D., 253 U.S. 325, 40 S. Ct. 558, 64 L. Ed. 931 (1920).

2 U.S.—[State Tax Commission of Utah v. Aldrich](#), 316 U.S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A.L.R. 1436 (1942).

Ohio—[Kroger Grocery & Baking Co. v. Evatt](#), 47 Ohio L. Abs. 183, 68 N.E.2d 673 (B.T.A. 1946), order aff'd, 149 Ohio St. 448, 37 Ohio Op. 120, 79 N.E.2d 228 (1948).

3 U.S.—[American Life Ins. Co. v. Stewart](#), 300 U.S. 203, 57 S. Ct. 377, 81 L. Ed. 605, 111 A.L.R. 1268 (1937); [Wheeling Steel Corp. v. Fox](#), 298 U.S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936).

Ga.—[Northwestern Mut. Life Ins. Co. v. Suttles](#), 201 Ga. 84, 38 S.E.2d 786 (1946).

Intangible property of railroad

U.S.—[Baker v. Druesedow](#), 263 U.S. 137, 44 S. Ct. 40, 68 L. Ed. 212 (1923).

4 § 2310.

Fla.—[Gay v. Bessemer Properties](#), 159 Fla. 729, 32 So. 2d 587 (1947).

Ga.—[Davis v. Penn Mut. Life Ins. Co.](#), 201 Ga. 821, 41 S.E.2d 406 (1947).

Royalties earned from licensing trademarks

Assessments against an alleged taxpayer for a business franchise tax on royalties earned from the nationwide licensing of food industry trademarks and trade names satisfied neither the purposeful direction requirement under the Due Process Clause nor the significant economic presence under the Commerce Clause, where the alleged taxpayer, with no physical presence in West Virginia, did not sell or distribute food-related products or provide services in West Virginia, all products were manufactured solely by the alleged taxpayer's unrelated or affiliated licensees outside of West Virginia, the alleged taxpayer did not direct or dictate how its licensees distributed the products, and the licensees, operating no retail stores in West Virginia, sold the products only to wholesalers and retailers in West Virginia.

W. Va.—[Griffith v. ConAgra Brands, Inc.](#), 229 W. Va. 190, 728 S.E.2d 74 (2012).

6 U.S.—[State Tax Commission of Utah v. Aldrich](#), 316 U.S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A.L.R. 1436 (1942); [Curry v. McCanless](#), 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939).

7 Ky.—[Commonwealth ex rel. Martin v. Sutcliffe](#), 283 Ky. 274, 140 S.W.2d 1028 (1940).

16D C.J.S. Constitutional Law § 2312

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

2. Taxing Jurisdiction

§ 2312. Taxation of out-of-state activities

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

A state's power to tax out-of-state activities is limited by due process.

Both the Due Process and Commerce Clauses impose distinct but parallel limitations on a state's power to tax out-of-state activities,¹ and both bar states from taxing extraterritorial values.² The physical presence of a business inside a taxing state is not required to satisfy due process, so long as the business engages in some purposeful direction to the state.³ The broad inquiry, as it bears on the State's ability to tax out-of-state activities, is whether the taxing power exerted by the State bears a fiscal relation to the protection, opportunities, and benefits given by the State,⁴ i.e., whether the State has given anything for which it can ask a return,⁵ and the relation must be to the activity itself, not merely to the company the State seeks to tax.⁶ Reduced to its most straightforward formulation, a state simply cannot tax value that is earned outside its borders.⁷

A state cannot tax a purported unitary business unless at least some part of it is conducted in the state.⁸ Entities that operate in multiple states are not immune from state taxation, so long as the state fairly apportions and taxes the foreign entity for business conducted within that state.⁹

CUMULATIVE SUPPLEMENT

Cases:

In the context of state taxation, the Due Process Clause limits States to imposing only taxes that bear fiscal relation to protection, opportunities, and benefits given by the State. [U.S. Const. Amend. 14. North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 \(2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 \(2008\)](#).
Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury, 437 Md. 492, 87 A.3d 1263 \(2014\)](#).
Wash.—[Lamtec Corp. v. Department of Revenue, 170 Wash. 2d 838, 246 P.3d 788 \(2011\)](#).
Relationship between clauses
A finding that the imposition of a tax does not violate the dormant Commerce Clause is sufficient to establish that the imposition also does not violate the Due Process Clause even though the converse is not true.
Wash.—[Flight Options, LLC v. State, Dept. of Revenue, 172 Wash. 2d 487, 259 P.3d 234 \(2011\)](#).
- 2 U.S.—[MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 \(2008\)](#).
Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury, 437 Md. 492, 87 A.3d 1263 \(2014\)](#).
As to the minimum contacts required, see § 2310.
- 3 U.S.—[MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 \(2008\)](#).
Tenn.—[Blue Bell Creameries, LP v. Roberts, 333 S.W.3d 59, 74 A.L.R.6th 613 \(Tenn. 2011\)](#).
Tex.—[In re Nestle USA, Inc., 387 S.W.3d 610 \(Tex. 2012\)](#).
- 4 **Due process not violated**
Property tax a State Department of Revenue assessed on airplanes operated by a company related to opportunities, benefits, or protection conferred by the State such that the tax was consistent with due process, where assessment of the tax was limited to the proportion of the value of the airplanes commensurate with the proportion of time the airplanes spent in the state, and while in the state, the company's airplanes enjoyed the protection of the state's criminal laws, search and rescue services, and opportunities for further commerce.
Wash.—[Flight Options, LLC v. State, Dept. of Revenue, 172 Wash. 2d 487, 259 P.3d 234 \(2011\)](#).
- 5 U.S.—[MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 \(2008\)](#).
- 6 Ill.—[Irwin Indus. Tool Co. v. Illinois Dept. of Revenue, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 \(2010\)](#).
Tex.—[In re Nestle USA, Inc., 387 S.W.3d 610 \(Tex. 2012\)](#).
- 7 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 \(2011\)](#).
- 8 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 \(2011\)](#).
- 9 Pa.—[Wirth v. Com., 95 A.3d 822 \(Pa. 2014\), cert. denied, 135 S. Ct. 1405 \(2015\)](#).

16D C.J.S. Constitutional Law § 2313

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

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§ 2313. Taxation of out-of-state activities—Four-part test

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West's Key Number Digest

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The tax must be applied to (1) an activity with a substantial nexus with the taxing state, (2) the tax must be fairly apportioned, (3) the tax must not discriminate against interstate commerce, and (4) the tax must be fairly related to services provided by the taxing state.

The test to be used in analyzing the formula apportionment methods of taxing multistate corporations for constitutional infirmities under the Due Process and Commerce Clauses states that the tax must be applied to (1) an activity with a substantial nexus with the taxing state, (2) the tax must be fairly apportioned, (3) the tax must not discriminate against interstate commerce, and (4) the tax must be fairly related to services provided by the taxing state.¹

Under the fair apportionment prong, there are two requirements: internal consistency and external consistency.² A tax apportionment formula is internally consistent when, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed; this component looks to the structure of the tax at issue to see whether its identical application by every state in the union would place interstate commerce at a disadvantage as compared with commerce intrastate.³ External consistency is satisfied only if the factor or factors used in the apportionment formula actually reflect a

reasonable sense of how income is generated.⁴ External consistency looks to the economic justification for the state's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state; i.e., whether the state's tax law reasonably reflects the activity within its jurisdiction.⁵ Under the fair apportionment prong, an imperfect approximation short of grossly distorted results is tolerated.⁶

Under the discrimination prong, the analysis first distinguishes between facially discriminatory taxes, i.e., those that explicitly put greater burdens on out-of-state businesses or provide more favorable terms to in-state businesses and those that have discriminatory effects or purpose.⁷ Under this prong, claims of discrimination need not be accompanied by specific factual proofs.⁸

The fourth prong, fair relation, examines whether the taxpayer received benefits from the taxing state.⁹ This prong imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, and although this language may suggest a proportionality requirement between the benefits provided and the tax paid, that is not the case for general revenue taxes like net income taxes.¹⁰

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Footnotes

1 Miss.—[Tennessee Gas Pipeline Co. v. Marx](#), 594 So. 2d 615 (Miss. 1992).
N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
Okla.—[Cities Service Gas Co. v. Oklahoma Tax Com'n](#), 1989 OK 69, 774 P.2d 468 (Okla. 1989).
As to the minimum contacts needed to exercise the power of taxation, see § 2310.

2 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
Determination of unitary business
In evaluating whether the tax apportionment formula applies, a court must determine whether intrastate and extrastate activities formed part of a single unitary business or whether the out-of-state values that the State seeks to tax derived from unrelated business activity that constitutes a discrete business enterprise.
Mass.—[Capital One Bank v. Commissioner of Revenue](#), 453 Mass. 1, 899 N.E.2d 76 (2009).
As to apportionment of in-state taxes, see § 2304.
As to apportionment of franchise taxes, see § 2314.

3 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
4 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
5 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
6 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
7 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
8 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
9 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).
As to whether the taxing power exerted by a state bears a fiscal relation to the protection, opportunities, and benefits given by the state, see § 2312.

10 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).

16D C.J.S. Constitutional Law § 2314

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§ 2314. Excise or franchise taxes

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4140, 4141

A tax on the privilege of being a corporation is not a denial of due process of law if otherwise valid; however, a state cannot, through the guise of a franchise tax, exert its taxing authority over business done outside its bounds by foreign corporations.

A tax on the privilege of being a corporation is not a denial of due process of law if otherwise valid.¹ The imposition of a franchise tax does not violate the Due Process Clause where there is a minimal connection between the company's interstate activities and the taxing state, and there is a rational relationship between the income attributed to the taxing state and the intrastate values of the enterprise.² However, a state cannot, through the guise of a franchise tax, exert its taxing authority over business done outside its bounds by foreign corporations.³

The levy by a state of excise or franchise taxes on a foreign corporation, in proportion to the corporation's tangibles and intangibles employed in the state, does not violate the Due Process Clause of the Fourteenth Amendment.⁴ On the other hand, an excise tax, which does not segregate local and foreign business taxes property beyond the state's jurisdiction in violation of the Due Process Clause.⁵

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Footnotes

1 La.—[Conway v. Lane Cotton Mills Co.](#), 178 La. 626, 152 So. 312 (1933).

Tex.—[Houston Oil Co. of Texas v. Lawson](#), 175 S.W.2d 716 (Tex. Civ. App. Galveston 1943), writ refused.

No due process violation

The inclusion of various exemptions, classifications, and special deductions in a state franchise tax did not violate the Fourteenth Amendment's Due Process Clause as the structure of the franchise tax was reasonably related to the privilege of doing business in the state.

Tex.—[In re Nestle USA, Inc.](#), 387 S.W.3d 610 (Tex. 2012).

2 Del.—[Lehman Bros. Bank, FSB v. State Bank Com'r](#), 937 A.2d 95 (Del. 2007), as modified, (Nov. 9, 2007). As to the minimum contacts requirements, generally, see § 2310.

3 U.S.—[Connecticut General Life Ins. Co. v. Johnson](#), 303 U.S. 77, 58 S. Ct. 436, 82 L. Ed. 673 (1938); [Southern Ry. Co. v. Commonwealth of Kentucky](#), 274 U.S. 76, 47 S. Ct. 542, 71 L. Ed. 934 (1927).

Violation of Commerce and Due Process Clauses

Assessing a corporate franchise tax on about 64% of a nondomiciliary corporation's gain from its sale of commercial property in another state, pursuant to a statutory apportionment formula, violated the Commerce and Due Process Clauses, as that portion of the gain from the sale of the property could not in fairness be attributed to the corporation's activities within the taxing state and application of the formula gave a distorted result.

N.Y.—[British Land \(Maryland\), Inc. v. Tax Appeals Tribunal of State of N.Y.](#), 85 N.Y.2d 139, 623 N.Y.S.2d 772, 647 N.E.2d 1280 (1995).

4 As to taxation of out-of-state activities, see §§ 2312, 2313.

Cal.—[Southern Pac. Co. v. McColgan](#), 68 Cal. App. 2d 48, 156 P.2d 81 (1st Dist. 1945).

Tenn.—[Crane Co. v. Carson](#), 191 Tenn. 353, 234 S.W.2d 644 (1950).

Allocation or apportionment based on assets of subsidiaries

The failure to include foreign subsidiaries' property, payroll, and sales in the denominator of an apportionment formula, for purposes of calculating a corporate taxpayer's excise taxes, did not violate the Due Process Clause, even though the subsidiaries' interest and royalty payments to the taxpayer were included in its apportionable income, as the interest and royalty payments represented expenses to the foreign subsidiaries and no income from the subsidiaries was included in the net income base.

Mass.—[Gillette Co. v. Commissioner of Revenue](#), 425 Mass. 670, 683 N.E.2d 270 (1997).

As to the fair apportionment prong of the test used to determine the validity of taxation of out-of-state activities, generally, see § 2313.

5 Wash.—[Great Northern Ry. Co. v. State](#), 147 Wash. 630, 267 P. 506 (1928) (disapproved of on other grounds by, [State v. Northern Pac. Ry. Co.](#), 183 Wash. 33, 48 P.2d 931 (1935)).

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N. Taxation, in General

3. Assessment

§ 2315. Assessment, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4138(1)

In the absence of arbitrary or discriminatory action, a particular assessment or valuation does not deprive the owner of property without due process of law.

Questions of due process relating to tax assessment statutes include questions as to whether the assessment is excessive, whether the assessed property is taxable, whether the tax is valid, the right to be heard,¹ and whether the levied tax is a general or special tax.²

Tax laws, by their very nature, are designed to classify, and they will not be disturbed under the Due Process Clause provided that all persons in the same situation are treated alike and the tax is imposed equally upon all property of the class to which it belongs.³ In the absence of arbitrary or discriminatory action, a particular assessment or valuation does not deprive the owner of property without due process of law,⁴ even where different methods of assessment are used for similar taxpayers.⁵

However, due process of law is denied if the method pursued in valuing property is arbitrary and the resulting valuation is grossly excessive.⁶ Moreover, due process is denied if the particular assessment is discriminatory,⁷ as where there is an intentional

and systematic valuation of property below its real value or the statutory percentage for tax purposes, while the complainant's property is held to a higher basis of value.⁸

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Footnotes

1 Ga.—[Pullman Co. v. Suttles](#), 187 Ga. 217, 199 S.E. 821 (1938).
As to the right to notice and a hearing, see §§ 2316, 2317.

2 Neb.—[Frye v. Haas](#), 182 Neb. 73, 152 N.W.2d 121 (1967).

3 N.Y.—[Aydin v. Commissioner of Taxation and Finance](#), 81 A.D.3d 1203, 917 N.Y.S.2d 427 (3d Dep't 2011).

4 U.S.—[Hess v. Mullaney](#), 15 Alaska 40, 213 F.2d 635 (9th Cir. 1954).
Ala.—[Phillips v. Hinkle](#), 262 Ala. 330, 78 So. 2d 800 (1955).
Ky.—[Harlan-Wallins Coal Corp. v. Cawood](#), 303 Ky. 544, 198 S.W.2d 218 (1946).

Combined assessed value exceeds 100%
The Due Process Clause did not strictly prohibit any overlap between California and Nevada in connection with property taxation of an aircraft, even if the two states' combined valuations exceeded 100% of the value of the aircraft.
Cal.—[Auerbach v. Assessment Appeals Bd. No. 2 for County of Los Angeles](#), 167 Cal. App. 4th 1415, 85 Cal. Rptr. 3d 118 (2d Dist. 2008).

5 Ala.—[Opinion of the Justices](#), 925 So. 2d 193 (Ala. 2006).
Iowa—[Michigan Wisconsin Pipe Line Co. v. Iowa State Bd. of Tax Review](#), 368 N.W.2d 187 (Iowa 1985).
Mo.—[Associated Industries of Missouri v. State Tax Com'n of Missouri](#), 722 S.W.2d 916 (Mo. 1987).

6 U.S.—[In re Chicago Rys. Co.](#), 79 F. Supp. 989 (N.D. Ill. 1948), judgment aff'd, 175 F.2d 282 (7th Cir. 1949).
Ark.—[Sorkin v. Myers](#), 216 Ark. 908, 227 S.W.2d 958 (1950).
Kan.—[Northern Natural Gas Co. v. Williams](#), 208 Kan. 407, 493 P.2d 568 (1972).

Unlimited discretion given
A tax law relating to standards of assessment in certain assessing units improperly delegated to administrative officials the power to determine how great a tax burden would be placed on particular pieces of property and improperly gave assessors unlimited discretion to select the rate at which property would be assessed; by failing to provide valid standards for the classification of real property for tax purposes, and the statute worked a denial of due process.
N.Y.—[Rego Properties Corp. v. Finance Adm'r](#), 102 Misc. 2d 641, 424 N.Y.S.2d 621 (Sup 1980).

7 Ill.—[People ex rel. Toman v. Chicago Union Station Co.](#), 383 Ill. 153, 48 N.E.2d 524 (1943).
Tenn.—[Treadwell Realty Co. v. City of Memphis](#), 173 Tenn. 168, 116 S.W.2d 997 (1938).

Improper administration
The owners of nonhomestead commercial real property stated a due process claim regarding a city's alleged practice of intentionally miscalculating nonhomestead real property taxes, where annexed minutes from city council meetings and a letter from the city's mayor acknowledged that the city's nonhomestead property owners were overtaxed for a period of at least 12 years, and affidavits from the city's mayor and its director of finance stated that the miscalculation was done deliberately at the direction of a former city administrator.
N.Y.—[Way v. City of Beacon](#), 96 A.D.3d 829, 947 N.Y.S.2d 531 (2d Dep't 2012).

8 U.S.—[Central R. Co. of New Jersey v. Martin](#), 65 F.2d 613 (C.C.A. 3d Cir. 1933); [Weissinger v. Boswell](#), 330 F. Supp. 615 (M.D. Ala. 1971).

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3. Assessment

§ 2316. Notice and hearing

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4138(2)

Generally, where the amount of the tax is to depend on the value of the property, it is essential that the persons assessed have some kind of notice and an opportunity to be heard at some stage of the proceedings before the charge or liability becomes finally and conclusively fixed.

Generally, where the amount of the tax is to depend on the value of the property, it is essential that the persons assessed have some kind of notice¹ and an opportunity to be heard² at some stage of the proceedings before the charge or liability becomes finally and conclusively fixed. Due process normally does not imply or require the right to such notice and hearing as are considered to be essential in judicial proceedings.³ However, assessment procedures which affect individual taxpayers, rather than taxpayers as group, and which involve the ascertainment of facts material to those individuals, are adjudicatory in nature and may trigger the due process requirement of trial-type procedures.⁴ Nonetheless, once taxpayers are provided with notice and opportunity to be heard on the adjudicative facts concerning the valuation of property subject to tax, they have received all the process that is due.⁵

Although a taxpayer's opportunity to contest the imposition of a tax, on due process grounds, need not precede the assessment and collection of the tax,⁶ where a statute requires payment of the assessed tax or the posting of suitable security for the tax upon an indigent taxpayer as a jurisdictional prerequisite for a hearing, a due process violation will be found where such requirement prevents the taxpayer from exhausting all administrative remedies, which is a necessary preliminary step in seeking judicial review of the assessed tax.⁷

A statute requiring county commissions annually to sit as a board of equalization and review assessments made by the assessor does not deprive taxpayers of a hearing before an impartial tribunal in violation of due process despite the commission's overarching interest in the outcome of every assessment challenge to its tax base.⁸

Requiring a taxpayer challenging a property tax assessment to prove by clear and convincing evidence that the assessor's assessment is erroneous does not violate due process.⁹

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Footnotes

1 U.S.—[Nickey v. State of Mississippi](#), 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934); [Catoor v. Blair](#), 358 F. Supp. 815 (N.D. Ill. 1973), judgment aff'd, 414 U.S. 990, 94 S. Ct. 345, 38 L. Ed. 2d 231 (1973).

Ga.—[Hamilton v. Edwards](#), 245 Ga. 810, 267 S.E.2d 246 (1980).

Neb.—[State ex rel. Meyer v. Peters](#), 191 Neb. 330, 215 N.W.2d 520 (1974).

2 U.S.—[Nickey v. State of Mississippi](#), 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934).

Kan.—[Shields Oil Producers, Inc. v. Russell County](#), 229 Kan. 579, 629 P.2d 152 (1981).

Wash.—[Peters v. Sjoholm](#), 95 Wash. 2d 871, 631 P.2d 937 (1981).

3 Cal.—[People v. Skinner](#), 18 Cal. 2d 349, 115 P.2d 488, 149 A.L.R. 299 (1941).

Del.—[Pottoc v. Mellott](#), 41 Del. 361, 22 A.2d 843 (1941).

N.D.—[American Crystal Sugar Co. v. Traill County Bd. of Com'rs](#), 2006 ND 118, 714 N.W.2d 851 (N.D. 2006).

Wis.—[State ex rel. Kappa Sigma Bldg. Ass'n v. Bareis](#), 226 Wis. 229, 276 N.W. 317, 113 A.L.R. 985 (1937).

No right to cross-examine witnesses

A county commissioners' tax abatement hearing, at which a town was given the opportunity to address questions to witnesses through the county commissioners but not permitted to cross-examine the witnesses, did not violate due process; it was unnecessary to import into the county commissioners' hearing all those safeguards of court proceedings in order to meet the requirements of due process.

Me.—[Town of Vienna v. Kokernak](#), 612 A.2d 870 (Me. 1992).

Procedural due process afforded

A statute which allows the property appraisal adjustment board to appoint special masters to take testimony and make recommendations, on which the board may act without a further hearing, provides taxpayers with procedural due process, where taxpayers desiring to challenge the ad valorem real property tax assessments are afforded not only notice and an opportunity to be heard at an administrative level but also an absolute right to trial de novo in the circuit court.

Fla.—[Bath Club, Inc. v. Dade County](#), 394 So. 2d 110 (Fla. 1981).

Second opportunity to protest not required

Since every landowner is given an opportunity to protest when his or her land is assessed for general taxation, a statute which governs procedures for assessments for a suburban improvement district is not unconstitutional in failing to provide a landowner with a second opportunity to contest the property valuation underlying the assessment.

Ark.—[Harrill v. Board of Com'rs of Clinton Road Water Pipe Line Imp. Dist. No. 328 of Pulaski County](#), 282 Ark. 348, 668 S.W.2d 538 (1984).

4 Alaska—[Property Owners Ass'n of the Highland Subdivision a Portion of USMS 769, Ketchikan, Alaska v. City of Ketchikan](#), 781 P.2d 567 (Alaska 1989).

Action taken in quasi-judicial capacity

A county board of equalization acted in a quasi-judicial capacity when it denied an ad valorem tax protest and, thus, was subject to the constitutional guaranty of due process of law.

5 Okla.—[Larry Jones Intern. Ministries, Inc. v. Means](#), 1997 OK 125, 946 P.2d 669 (Okla. 1997).

N.Y.—[Sheehan v. Suffolk County](#), 67 N.Y.2d 52, 499 N.Y.S.2d 656, 490 N.E.2d 523 (1986).

6 As to what constitutes proper delivery of notice, see § 2317.

Tenn.—[Waters v. Farr](#), 291 S.W.3d 873 (Tenn. 2009).

7 Neb.—[Boll v. Department of Revenue, State of Neb.](#), 247 Neb. 473, 528 N.W.2d 300 (1995).

8 As to the right to judicial review, see § 2318.

9 W. Va.—[Mountain America, LLC v. Huffman](#), 224 W. Va. 669, 687 S.E.2d 768 (2009).

W. Va.—[Mountain America, LLC v. Huffman](#), 224 W. Va. 669, 687 S.E.2d 768 (2009).

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16D C.J.S. Constitutional Law § 2317

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

3. Assessment

§ 2317. Notice and hearing—Delivery of notice

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4138(2)

The due process required in sending a notice of tax assessment is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

The due process required in sending a notice of tax assessment is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹

Delivery of notice by United States mail complies with due process.² Service by publication may be sufficient, whether the hearing is before a statutory board or a court,³ however, where the names and addresses of those subject to the assessment are either known or easily ascertainable, publication notice alone does not satisfy due process.⁴ Furthermore, the enactment of a tax law may be sufficient notice by itself,⁵ particularly where it prescribes the time and the place for a meeting of the assessors at which the taxpayers are afforded an opportunity to be heard.⁶

Where the notice fails to adequately inform the taxpayer of the right to appear there is a due process violation.⁷

CUMULATIVE SUPPLEMENT

Cases:

Copy of notice of deficiency (NOD) as well as Form 4340 established that Internal Revenue Service (IRS) properly mailed NOD to taxpayer before assessing deficiency for subject year; while Form 4340s did not show when NODs were mailed, they did show the dates when the government assessed deficiencies against taxpayer and explained that those assessments were made per default of 90 day letter. [26 U.S.C.A. § 6212. United States v. Meyer, 914 F.3d 592 \(8th Cir. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Minn.—[Turner v. Commissioner of Revenue, 840 N.W.2d 205 \(Minn. 2013\)](#).
No additional steps required
The Internal Revenue Service (IRS) did not violate a taxpayer's right to due process of law by assessing income tax liability without taking additional steps, after a deficiency notice sent via certified mail was returned unclaimed, to notify the taxpayer of the deficiency determination.
U.S.—[Pagonis v. U.S., 575 F.3d 809 \(8th Cir. 2009\)](#).
- 2 N.H.—[In re City of Concord, 161 N.H. 169, 13 A.3d 287 \(2010\)](#).
- 3 Cal.—[Westinghouse Elec. Corp. v. County of Los Angeles, 42 Cal. App. 3d 32, 116 Cal. Rptr. 742 \(2d Dist. 1974\)](#).
N.Y.—[Feig v. Board of Assessors of Town of Fallsburg, Sullivan County, 69 Misc. 2d 322, 329 N.Y.S.2d 905 \(Sup 1972\)](#).
- 4 Okla.—[In re Turkey Creek Conservancy Dist., 2008 OK 8, 177 P.3d 558 \(Okla. 2008\)](#).
- 5 Neb.—[Frye v. Haas, 182 Neb. 73, 152 N.W.2d 121 \(1967\)](#).
- 6 N.Y.—[In re 801-815 East New York Avenue, Borough of Brooklyn City of New York, 290 N.Y. 236, 48 N.E.2d 502 \(1943\)](#).
- 7 W. Va.—[Lee Trace, LLC v. Raynes, 232 W. Va. 183, 751 S.E.2d 703 \(2013\)](#).

16D C.J.S. Constitutional Law § 2318

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

3. Assessment

§ 2318. Right to challenge assessment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4138(1), 4138(2)

A taxpayer has a due process right to challenge the accuracy and proportionality of the assessment and taxation of property.

A taxpayer has a due process right to challenge the accuracy and proportionality of the assessment and taxation of property.¹ When a taxpayer challenges a decision of the board of equalization, the decision of the board is equivalent to the determination of a trial court, and the trial court in turn may review only the record presented to the board; thus, the trial court may overturn the board's decision only when no substantial evidence supports it, in which case the actions of the board are deemed so arbitrary as to constitute a deprivation of property without due process.²

Requiring the paying of a tax before obtaining judicial review of the assessment does not violate due process.³

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Footnotes

1 Miss.—[Bond v. Marion County Bd. of Sup'rs](#), 807 So. 2d 1208 (Miss. 2001).

Sending bills to those with pending appeals

The practice of sending property tax bills to taxpayers who had pending appeals of their tax assessments did not violate due process, where the statutory predeprivation remedy, which allowed taxpayers to pay less than the full amount of tax assessed during the appeal process, and postdeprivation remedy, which provided for a refund if appropriate, satisfied state and federal due process requirements.

Ga.—[Hooten v. Thomas](#), 297 Ga. App. 487, 677 S.E.2d 670 (2009).

Property valuation

(1) Fairness and procedural due process require that where market value is established based on sales of comparable property this information should be provided to a taxpayer who appeals the appraised value of his or her property.

Mont.—[DeVoe v. Department of Revenue of State of Mont.](#), 263 Mont. 100, 866 P.2d 228 (1993), as amended on denial of reh'g, (Feb. 3, 1994).

(2) A statute providing that no appeal "shall be heard" from an assessor's valuation of property, unless the taxpayer timely responds to the assessor's request for information on the property, did not violate the taxpayer's procedural or substantive due process rights, where the statute was reasonably related to the state's legitimate interest in the timely receipt of economic information necessary for an accurate valuation of the property.

N.J.—[Ocean Pines, Ltd. v. Borough of Point Pleasant](#), 112 N.J. 1, 547 A.2d 691 (1988).

2 Cal.—[EHP Glendale v. County of Los Angeles](#), 193 Cal. App. 4th 262, 122 Cal. Rptr. 3d 378 (2d Dist. 2011).

3 Fla.—[Bystrom v. Diaz](#), 514 So. 2d 1072 (Fla. 1987).

Vt.—[Vermont Golf Ass'n, Inc. v. Department of Taxes](#), 192 Vt. 224, 2012 VT 68, 57 A.3d 707 (2012).

Payment-under-protest provisions

The payment-under-protest provisions of a city ordinance, requiring payment under protest in order for taxpayers to contest the imposition of penalties and the collection fees assessed on their delinquent ad valorem taxes, were accompanied by meaningful postdeprivation relief, such that requiring taxpayers to comply with the provisions in order to preserve their right to contest the penalties and collection fees complied with due process, where the ordinance provided that, if the taxpayer followed the procedures set forth and prevailed in the suit, the taxing unit had to refund the amount held in an escrow account to the taxpayer, and the statute provided that if the taxpayer prevailed, the collecting officer had to refund the disputed amount to the taxpayer, with interest at the actual rate earned on the money paid under protest in the escrow account during the period, from the date such funds were received by the collecting officer to the date of the refund.

La.—[Jackson v. City of New Orleans](#), 144 So. 3d 876 (La. 2014), cert. denied, 135 S. Ct. 197, 190 L. Ed. 2d 130 (2014).

16D C.J.S. Constitutional Law § 2319

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

4. Collection and Enforcement

a. In General

§ 2319. Collection and enforcement, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4138(3)

Any means adopted by the legislature for the collection and enforcement of taxes, if sufficient to protect the substantial and fundamental rights of the taxpayer, does not deny due process of law.

Any means adopted by the legislature for the collection and enforcement of taxes, if sufficient to protect the substantial and fundamental rights of the taxpayer, does not deny due process of law.¹

Laws providing summary remedies for the collection of delinquent taxes are not open to constitutional objection because they dispense with some of the formalities or ordinary judicial procedure, or cut off technical defenses, or authorize the seizure of property first, and a hearing afterward, provided the taxpayer is given an opportunity at some stage of the proceedings, and before his or her rights are finally cut off, to contest the validity of the tax or his or her liability with respect to it.² Thus, land may be summarily foreclosed and sold for delinquent taxes by administrative process alone, without violating due process principles, if there has been compliance with the applicable statute and landowners are afforded an opportunity to be heard by

an administrative tribunal.³ Similarly, personal property may be seized through the use of summary procedures such as distraint proceedings.⁴

On the other hand, the enforcement of taxes by arbitrary methods constitutes a denial of due process.⁵ For example, personal property may not be seized by the execution of levy upon a statutory lien without a prior demand for payment or without providing the taxpayer with an opportunity to make payment.⁶

The unlawful collection of taxes,⁷ as under an invalid law,⁸ is a taking of property without due process of law.

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Footnotes

1

Cal.—[People v. Skinner](#), 18 Cal. 2d 349, 115 P.2d 488, 149 A.L.R. 299 (1941).

Mo.—[Ploch v. City of St. Louis](#), 345 Mo. 1069, 138 S.W.2d 1020 (1940).

Wash.—[Outlook Irr. Dist. v. Fels](#), 176 Wash. 211, 28 P.2d 996 (1934).

Refusal to accept payment

(1) Taxpayers' due process rights were not violated when a county refused to accept a personal check as payment for overdue taxes, where the notice of foreclosure stated the county's payment policy months in advance of the final date of redemption.

U.S.—[Miner v. Clinton County, N.Y.](#), 541 F.3d 464 (2d Cir. 2008).

(2) A taxpayer does not have a fundamental right to pay property taxes by specification on subdivided parcels, and thus a county's refusal to accept payment by specification does not violate the taxpayer's substantive due process rights.

Ill.—[Bigelow Group, Inc. v. Rickert](#), 377 Ill. App. 3d 165, 315 Ill. Dec. 842, 877 N.E.2d 1171 (2d Dist. 2007).

2

U.S.—[Bormann v. Tomlin](#), 461 F. Supp. 193 (S.D. Ill. 1978), aff'd, 622 F.2d 592 (7th Cir. 1980).

No preseizure hearing required

A statute authorizing the summary seizure and sale of personal property, improvements, and possessory interests, belonging or assessed to the assessee, for collection of taxes on unsecured property did not deny a taxpayer due process insofar as it authorized the seizure of the taxpayer's property without affording him an administrative hearing prior to the seizure, but, insofar as it authorized the sale of the taxpayer's property without affording him an administrative hearing prior to sale, it deprived the taxpayer of due process.

Cal.—[T. M. Cobb Co. v. County of Los Angeles](#), 16 Cal. 3d 606, 128 Cal. Rptr. 655, 547 P.2d 431, 19 U.C.C. Rep. Serv. 305 (1976).

Or.—[Hood River County v. Dabney](#), 246 Or. 14, 423 P.2d 954 (1967).

3

Ky.—[Com. ex rel. Carpenter v. Collins & May](#), 593 S.W.2d 887 (Ky. Ct. App. 1980).

Wash.—[Devine v. Whatcom County](#), 71 Wash. 2d 215, 427 P.2d 731 (1967).

Administrative hearing sufficient

Seizure by the department of revenue of a taxpayer's bank account as payment for delinquent taxes did not violate the taxpayer's due process rights where the department followed statutory procedures, gave the taxpayer notice of tax assessed against him, and afforded the taxpayer an administrative hearing on the matter of his tax liability.

Wash.—[Peters v. Sjoholm](#), 95 Wash. 2d 871, 631 P.2d 937 (1981).

5

U.S.—[Morrison-Knudsen Co. v. State Bd. of Equalization of Wyoming](#), 35 F. Supp. 553 (D. Wyo. 1940).

Colo.—[Liebhardt v. Department of Revenue](#), 123 Colo. 369, 229 P.2d 655 (1951).

Me.—[Opinion of the Justices](#), 139 Me. 420, 38 A.2d 561 (1943).

Rejection of redemption offer

(1) It was fundamentally unfair and a violation of a property owner's due process where a city required payment in an amount above that stated in a complaint and published notice for tax foreclosure on a property, where the owner alleged that she borrowed the amount stated in the published notice in order to redeem the

property, but that the city refused payment because additional taxes and penalties had accrued in the time between the resolution and the notice.

N.J.—[City of East Orange v. Kynor](#), 383 N.J. Super. 639, 893 A.2d 46 (App. Div. 2006).

(2) An arbitrary and unreasonable rejection by a county of a redemption offer for a property being sold for delinquent taxes, without reference to any articulated standards, violates due process of law.

N.Y.—[R. M. Investors Corp. v. Maggi](#), 104 Misc. 2d 41, 427 N.Y.S.2d 919 (County Ct. 1980), order aff'd, 120 Misc. 2d 327, 467 N.Y.S.2d 295 (App. Term 1983).

6 Mich.—[Fidlin v. Collison](#), 9 Mich. App. 157, 156 N.W.2d 53 (1967).

7 U.S.—[Ward v. Board of County Com'rs of Love County, Okl.](#), 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920).

As to remedies for improperly exacted taxes, see §§ 2308, 2309.

8 U.S.—[J. & A. Freiberg Co. v. Dawson](#), 274 F. 420 (W.D. Ky. 1920), aff'd, 255 U.S. 288, 41 S. Ct. 272, 65 L. Ed. 638 (1921).

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16D C.J.S. Constitutional Law § 2320

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XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

4. Collection and Enforcement

a. In General

§ 2320. Penalties and forfeitures

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4138(3)

Due process does not inhibit the imposition of reasonable penalties or forfeiture for the nonpayment of taxes.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution does not inhibit the imposition of reasonable penalties for the evasion or nonpayment of taxes.¹ Similarly, if some provision is made for notice to the owner and some form of hearing, provisions for forfeiture are not in violation of due process.² In a foreclosure action based on unpaid property taxes, to comply with due process, the complaint and published notice must advise the taxpayer of the total amount he or she must pay to avoid foreclosure, and the taxing entity may satisfy the due process requirement by stating the amount in the resolution, plus the amount of taxes, penalties, and costs due each quarter, so that the taxpayer may readily calculate the total amount necessary to avoid foreclosure.³

CUMULATIVE SUPPLEMENT

Cases:

Water and sewer districts, which were municipal corporations, lacked representational standing to assert, on behalf of ratepayers, due process vagueness challenge to code city's ordinance imposing excise tax; even though ratepayers would likely have had standing to challenge ordinance and neither claim asserted nor relief requested required participation of individual members in lawsuit, interests that districts sought to protect were not germane to their purpose, but rather only interests district sought to protect was relief from a tax burden. [U.S. Const. Amend. 14; Wash. Const. art. 1, § 3. Lakehaven Water and Sewer District v. City of Federal Way, 466 P.3d 213 \(Wash. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Southern Realty Corp. v. McCallum, 1 F. Supp. 614 \(W.D. Tex. 1932\), aff'd, 65 F.2d 934 \(C.C.A. 5th Cir. 1933\).](#)

Okla.—[Grubb v. Johnson Oil Refining Co., 1947 OK 124, 198 Okla. 433, 179 P.2d 688 \(1947\).](#)

Or.—[Gooch v. Rogers, 193 Or. 158, 238 P.2d 274 \(1951\).](#)

Penalty for filing late tax return

The Tax Commissioner, by subjecting a manufacturing subsidiary to treatment different from that which he accorded to the parent corporation in connection with requests for abatement of penalties incurred for filing late personal property tax returns, did not deprive the subsidiary of the tenets of due process, where the decision to abate the penalties of the parent corporation, which had less frequently filed late returns than had the subsidiary, was rationally related to the legitimate goal of encouraging taxpayers to file returns on time.

Ohio—[J.M. Smucker, L.L.C. v. Levin, 113 Ohio St. 3d 337, 2007-Ohio-2073, 865 N.E.2d 866 \(2007\).](#)

Imposition of penalties upon challenge to validity of tax

The fact that the revenue commissioner is statutorily authorized to seek penalties when a taxpayer challenges the validity of a tax by refusing to pay it is not a financial sanction tantamount to an attempt to secure the payment of taxes under duress, such that a taxpayer challenge would not be an effective predeprivation process for due process purposes, where the penalties are subject to waiver by the commissioner.

Ga.—[James B. Beam Distilling Co. v. State, 263 Ga. 609, 437 S.E.2d 782 \(1993\).](#)

Me.—[Inhabitants of Town of Warren v. Norwood, 138 Me. 180, 24 A.2d 229 \(1941\).](#)

Tenn.—[Stockton v. Morris & Pierce, 172 Tenn. 197, 110 S.W.2d 480 \(1937\).](#)

2 3 N.J.—[City of East Orange v. Kynor, 383 N.J. Super. 639, 893 A.2d 46 \(App. Div. 2006\).](#)

16D C.J.S. Constitutional Law § 2321

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N. Taxation, in General

4. Collection and Enforcement

b. Tax Sales

§ 2321. Tax sales, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4148

The taking of property from its owner by the state for purposes of its sale for delinquent taxes may not be accomplished without due process of law.

It is not a violation of the constitutional guarantees of due process to foreclose, pursuant to statutory authority, liens for delinquent taxes¹ even if the amount of the taxes owed is but a fraction of the value of the property subject to the lien.²

That the statutory tax sale process may have been followed, however, does not mean that constitutional due process has been satisfied.³ The taking of property from its owner by the state due to the failure of the owner to pay property taxes may not be accomplished without due process of law,⁴ which requires balancing the interest of the state against the individual interest to be protected by the Fourteenth Amendment.⁵ The fundamental due process rights of the property owners must be observed, and they must be given an opportunity to protect their interests.⁶

Incorrect references to the tax collector in notices of a tax-sale purchaser's filings of petitions to foreclose the right of redemption do not amount to a denial of process due to the property owner.⁷ Similarly, the erroneous description of property subject to a tax sale does not violate due process of law, where the fact that the property is to be sold is known to its owner,⁸ who is not misled by the erroneous description.⁹ On the other hand, constitutional due process requirements are violated when a property involved in tax foreclosure proceedings is so erroneously described that it cannot be reasonably identified.¹⁰

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Footnotes

1 Me.—[City of Auburn v. Mandarelli](#), 320 A.2d 22 (Me. 1974).
Neb.—[Commercial Sav. & Loan Ass'n v. Pyramid Realty Co.](#), 121 Neb. 493, 237 N.W. 575 (1931).

2 U.S.—[Balthazar v. Mari Limited](#), 301 F. Supp. 103 (N.D. Ill. 1969), judgment aff'd, [396 U.S. 114](#), 90 S. Ct. 397, 24 L. Ed. 2d 307 (1969).
D.C.—[Coleman v. Scheve](#), 367 A.2d 135 (D.C. 1976).
Me.—[City of Auburn v. Mandarelli](#), 320 A.2d 22 (Me. 1974).

Surplus retention
The retention by the taxing authority of the proceeds of a tax sale which exceed the amount owed by the former owner of a foreclosed property does not constitute a deprivation of property without due process of law.
U.S.—[Nelson v. City of New York](#), 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956); [Miner v. Clinton County, N.Y.](#), 541 F.3d 464 (2d Cir. 2008).

3 W. Va.—[Rebuild America, Inc. v. Davis](#), 229 W. Va. 86, 726 S.E.2d 396 (2012).

4 Cal.—[McMaster v. City of Santa Rosa](#), 27 Cal. App. 3d 598, 103 Cal. Rptr. 749 (1st Dist. 1972).
La.—[Mooring Tax Asset Group, L.L.C. v. James](#), 156 So. 3d 1143 (La. 2014).
Mich.—[Dow v. State](#), 396 Mich. 192, 240 N.W.2d 450 (1976).

5 Ind.—[Marion County Auditor v. Sawmill Creek, LLC](#), 964 N.E.2d 213 (Ind. 2012).

6 U.S.—[Balthazar v. Mari Limited](#), 301 F. Supp. 103 (N.D. Ill. 1969), judgment aff'd, [396 U.S. 114](#), 90 S. Ct. 397, 24 L. Ed. 2d 307 (1969).
Tex.—[Shaw v. Phillips Crane & Rigging of San Antonio, Inc.](#), 636 S.W.2d 186 (Tex. 1982).
As to the requirement of a notice and hearing in conjunction with tax sales, see §§ 2324, 2326.

7 R.I.—[Johnson v. QBAR Associates](#), 78 A.3d 48 (R.I. 2013).

8 U.S.—[Ontario Land Co. v. Yordy](#), 212 U.S. 152, 29 S. Ct. 278, 53 L. Ed. 449 (1909).

9 N.Y.—[Montgomery County v. Gasner](#), 68 Misc. 2d 300, 327 N.Y.S.2d 391 (County Ct. 1971).

10 N.Y.—[Tobias v. College Towne Homes, Inc.](#), 110 Misc. 2d 287, 442 N.Y.S.2d 380 (Sup 1981).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

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§ 2322. Jurisdiction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4148

Failure of procedural due process deprives the court of jurisdiction, and the legislature cannot legalize proceedings for sale which are absolutely void because of a jurisdictional defect.

Failure of procedural due process deprives the court of jurisdiction,¹ and the legislature cannot legalize proceedings for sale which are absolutely void because of a jurisdictional defect,² such as a failure to give notice of application for a tax deed.³

However, if it is within the power of the legislature to dispense with a requirement which the taxing officials have omitted, such a defect is not jurisdictional and does not deprive the property owner of his or her property without due process of law.⁴

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Footnotes

1 Md.—[Voltolina v. Property Homes, LLC](#), 198 Md. App. 590, 18 A.3d 944 (2011).

2 Cal.—[Jones v. Walker](#), 47 Cal. App. 2d 566, 118 P.2d 299 (2d Dist. 1941).

3 Mont.—[Lowery v. Garfield County](#), 122 Mont. 571, 208 P.2d 478 (1949).

4 N.Y.—[Helterline v. People](#), 295 N.Y. 245, 66 N.E.2d 345 (1946).

 Mont.—[Small v. Hull](#), 96 Mont. 525, 32 P.2d 4 (1934).

 Cal.—[McMaster v. City of Santa Rosa](#), 27 Cal. App. 3d 598, 103 Cal. Rptr. 749 (1st Dist. 1972).

 S.D.—[Randall v. Perkins County](#), 72 S.D. 497, 36 N.W.2d 845 (1949).

16D C.J.S. Constitutional Law § 2323

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 2323. Statutory limitations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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Within the confines of due process, statutes may place limitations on tax sales.

The statutory limitations on the ways to defeat a tax sale do not violate the substantive due process rights of a delinquent taxpayer.¹

While a statute may not deprive a property owner of his or her vested right of redemption,² the repeal of a previously enacted statute giving persons under a legal disability the privilege of redeeming land which had been sold for taxes, after the disability had been removed, is not a deprivation of due process.³

A statute may require that an action attacking a tax sale, or the imposition of a defense, be brought or interposed within a certain period of time.⁴ Similarly, a statute may fix a time after which claims by persons adverse to the tax title will be barred if it grants a reasonable time within which process may be had.⁵ In addition, a statute may validly require redemption within

a certain period,⁶ and if the owner is afforded a reasonable time to recover the property, a statute precluding the recovery of tax deeded premises is not invalid.⁷

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Footnotes

1 Ind.—[Swami, Inc. v. Lee](#), 841 N.E.2d 1173 (Ind. Ct. App. 2006).

2 U.S.—[U.S. v. 247 Acres of Land, more or less, City of Pittsburgh, Pa.](#), 104 F. Supp. 938 (W.D. Pa. 1952).

3 N.J.—[Montville Tp. v. Block 69, Lot 10](#), 74 N.J. 1, 376 A.2d 909 (1977).

3 Kan.—[State ex rel. McDowell v. Holcomb](#), 154 Kan. 222, 117 P.2d 591 (1941).

Statute foreclosing redemption

The one-year limitation period provided in a bill that would foreclose all rights of redemption 40 years after the recording of a tax title, despite defects, irregularities, or omissions in the procedure for taking or recording title, was a sufficient amount of time for an interested party to become familiar with the provisions of the statute and to take steps to protect his or her interests and, therefore, the one-year time limitation would not violate due process.

Mass.—[Opinion of the Justices to the House of Representatives](#), 408 Mass. 1215, 563 N.E.2d 203 (1990).

4 Iowa—[Campbell v. Bruce](#), 231 Iowa 1160, 3 N.W.2d 521 (1942).

Kan.—[Shell Oil Co. v. Board of County Com'rs of Grant County](#), 171 Kan. 595, 237 P.2d 257 (1951).

Or.—[Hood River County v. Dabney](#), 246 Or. 14, 423 P.2d 954 (1967).

Utah—[Hansen v. Morris](#), 3 Utah 2d 310, 283 P.2d 884 (1955).

5 Iowa—[Swanson v. Pontralo](#), 238 Iowa 693, 27 N.W.2d 21 (1947).

6 N.Y.—[City of New Rochelle v. Echo Bay Waterfront Corp.](#), 268 A.D. 182, 49 N.Y.S.2d 673 (2d Dep't 1944), order aff'd, 294 N.Y. 678, 60 N.E.2d 838 (1945).

Purchaser of property not required to inform property owner of redemption time limits

Mo.—[Sneil, LLC v. Tybe Learning Center, Inc.](#), 370 S.W.3d 562 (Mo. 2012).

7 Fla.—[Buck v. Triplett](#), 159 Fla. 772, 32 So. 2d 753 (1947).

16D C.J.S. Constitutional Law § 2324

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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§ 2324. Notice

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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Before a state may take property and sell it for unpaid taxes, the Due Process Clause requires the government to provide the property owner with notice.

Before a state may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the property owner with notice.¹ Although actual notice to the property owner satisfies due process,² due process does not require that a property owner receive actual notice before the government may take his or her property for unpaid taxes.³ Due process does require that the notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.⁴ Thus, notice that is sent after the tax sale but before the end of the redemption period and the actual transfer of the property violates due process.⁵

Where a party with an interest in property can reasonably be identified, from public records or otherwise, due process requires that such a party be provided notice by mail or other means as certain to ensure actual notice.⁶

When mailed notice of a tax sale is returned unclaimed, the state, as a matter of due process, must take additional reasonable steps to attempt to provide notice to the property owner before selling the property if it is practicable to do so.⁷ A taxpayer's failure to comply with the statutory obligation to keep his or her address updated does not result in forfeiture of the right to constitutionally sufficient notice,⁸ and the mere fact that it is common knowledge that property may become subject to a government taking when taxes are not paid does not excuse the government from complying with its obligation to provide notice before taking private property for delinquent taxes where the interested party's knowledge of the delinquency in payment of taxes is not equivalent to notice that a tax sale is pending.⁹

While a state, upon the return of an unclaimed notice, is not under any obligation to search for a new address in a local phonebook or in other government records,¹⁰ the State cannot proceed with the sale after simply publishing notice in the newspaper a few weeks prior to the sale, without ever posting notice at the address to which the notice was sent or taking other measures reasonably available to alert the taxpayer of the sale.¹¹

CUMULATIVE SUPPLEMENT

Cases:

After certified mail notifying property owner of impending tax sale of property was returned as undeliverable, county was required to attempt some other reasonable method of supplying notice to owner to satisfy requirements of due process, even though county had satisfied statutory notice requirements and owner had failed to timely pay taxes or provide updated address; return of certified notice as undelivered was red flag that should have tipped off county that it needed to follow up, and county could have undertaken other reasonable steps to attempt to provide owner with notice without necessarily being obligated to conduct lengthy hunt for correct address. [U.S.C.A. Const.Amend. 14](#); [Const. Art. 2, § 7](#); [68 Okl.St.Ann. §§ 3105, 3106](#). [Crownover v. Keel, 2015 OK 35, 357 P.3d 470 \(Okla. 2015\)](#).

Information given to landowner by tax claim bureau clerk, based on third notice of return and claim giving landowner until 2018 to pay claim for unpaid 2016 property taxes, was not erroneous or misleading, and thus landowner was not deprived of due process rights in judicial sale of land due to failure to pay 2014 taxes, where landowner admitted to receiving judicial sale notice setting the date for sale of his property in 2017, landowner asked clerk question specifically related to third notice, landowner did not ask whether scheduled judicial sale would take place despite information contained in third notice, and landowner did not receive notice canceling or postponing sale. [U.S. Const. Amend. 14](#); [72 Pa. Stat. Ann. § 5860.101 et seq.](#) [Brodhead Creek Associates, LLC v. County of Monroe, 231 A.3d 69 \(Pa. Commw. Ct. 2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

¹ U.S.—[Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 \(2006\)](#); [Oneida Indian Nation of New York v. Madison County, 665 F.3d 408 \(2d Cir. 2011\)](#), cert. dismissed, [134 S. Ct. 1582, 188 L. Ed. 2d 589 \(2014\)](#); [Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co., 661 F.3d 354 \(8th Cir. 2011\)](#). Ark.—[Rylwell, LLC v. Men Holdings 2, LLC, 2014 Ark. 522, 452 S.W.3d 96 \(2014\)](#). Ind.—[Marion County Auditor v. Sawmill Creek, LLC, 964 N.E.2d 213 \(Ind. 2012\)](#).

Mich.—[Sidun v. Wayne County Treasurer, 481 Mich. 503, 751 N.W.2d 453 \(2008\)](#).

² U.S.—[Oneida Indian Nation of New York v. Madison County, 665 F.3d 408 \(2d Cir. 2011\)](#), cert. dismissed, [134 S. Ct. 1582, 188 L. Ed. 2d 589 \(2014\)](#).

Ga.—[Saffo v. Foxworthy, Inc.](#), 286 Ga. 284, 687 S.E.2d 463 (2009).
Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).
3 U.S.—[Oneida Indian Nation of New York v. Madison County](#), 665 F.3d 408 (2d Cir. 2011), cert. dismissed, 134 S. Ct. 1582, 188 L. Ed. 2d 589 (2014); [Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.](#), 661 F.3d 354 (8th Cir. 2011).

4 Me.—[Stoops v. Nelson](#), 2013 ME 27, 61 A.3d 705 (Me. 2013).
U.S.—[Oneida Indian Nation of New York v. Madison County](#), 665 F.3d 408 (2d Cir. 2011), cert. dismissed, 134 S. Ct. 1582, 188 L. Ed. 2d 589 (2014); [Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.](#), 661 F.3d 354 (8th Cir. 2011).

Ark.—[Rylwell, LLC v. Men Holdings 2, LLC](#), 2014 Ark. 522, 452 S.W.3d 96 (2014).
Ind.—[Marion County Auditor v. Sawmill Creek, LLC](#), 964 N.E.2d 213 (Ind. 2012).
Me.—[Stoops v. Nelson](#), 2013 ME 27, 61 A.3d 705 (Me. 2013).
Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).
Mo.—[Collector of Revenue by and through the Director of Collections for Jackson County v. Parcels of Land Encumbered with Delinquent Land Tax Liens](#), 453 S.W.3d 746 (Mo. 2015).

Notice at each step of proceeding not required

Due process only requires notice of the pendency of the action and an opportunity to respond and does not require municipalities to send additional notices as each step in the tax foreclosure proceedings is completed.
U.S.—[Miner v. Clinton County, N.Y.](#), 541 F.3d 464 (2d Cir. 2008).

As to the requirement of a hearing, see § 2326.

5 Vt.—[Hogaboom v. Jenkins](#), 2014 VT 11, 93 A.3d 131 (Vt. 2014).

6 La.—[Smitko v. Gulf South Shrimp, Inc.](#), 94 So. 3d 750 (La. 2012) (certified mail).

W. Va.—[Citizens Nat. Bank of St. Albans v. Dunnaway](#), 184 W. Va. 453, 400 S.E.2d 888 (1990).

Strict compliance with notice statute required

Mont.—[Tacke v. Montana Lakeshore Properties, LLC](#), 2011 MT 197, 361 Mont. 390, 260 P.3d 128 (2011).
Pa.—[Horton v. Washington County Tax Claim Bureau](#), 623 Pa. 113, 81 A.3d 883 (2013).

Compliance with statute may not be enough

(1) Mere compliance with a state's notice statute may not be sufficient to satisfy the constitutional obligation of providing adequate notice of a tax forfeiture as required under the Due Process Clause.
U.S.—[Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.](#), 661 F.3d 354 (8th Cir. 2011).

(2) The application of a former version of the statute governing notice of a tax sale violated due process where the clerk knew that the notice mailed pursuant to the statute was ineffective and failed to take additional reasonable steps to notify the titleholder of the upcoming tax sale.
Fla.—[Delta Property Management v. Profile Investments, Inc.](#), 87 So. 3d 765 (Fla. 2012).

7 U.S.—[Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

Ind.—[Marion County Auditor v. Sawmill Creek, LLC](#), 964 N.E.2d 213 (Ind. 2012).

Mo.—[Schlereth v. Hardy](#), 280 S.W.3d 47 (Mo. 2009).

8 U.S.—[Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).

9 U.S.—[Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

10 U.S.—[Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).

11 U.S.—[Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).

Other measures not adequate

The Arkansas Commissioner of State Lands failed to provide adequate notice to a railroad of tax forfeiture of mineral rights, and thus violated the railroad's due process rights, even though the railroad had failed to update its address with the Commissioner, the Commissioner complied with state law, and the Commissioner, following the return of its two letters to the railroad as undeliverable, made inquiries among various land men, where the Commissioner could have taken the additional steps of making an internal inquiry among the Commissioner's employees, performing a search of the Commissioner's electronic records, or performing an Internet search.
U.S.—[Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.](#), 661 F.3d 354 (8th Cir. 2011).

Other measures that satisfy due process

(1) A county's failure to provide property owners with actual notice that a tax foreclosure proceeding had been initiated against their property after documents sent to their home address had been returned by the postal service as undeliverable did not violate due process, where the county published notice of the foreclosure proceeding and sent a copy of the petition to the owners at the address listed on the deed by first class mail, and there was no evidence that a further search of public records would have yielded any additional information about the property owners' whereabouts.

N.Y.—[Mac Naughton v. Warren County, 20 N.Y.3d 252, 959 N.Y.S.2d 104, 982 N.E.2d 1237 \(2012\)](#).

(2) A county auditor's efforts to provide notice of a tax sale of unimproved bare land to a corporate property owner were sufficient to satisfy due process, in a case in which the owner's name was misidentified on the closing statement, deed, and title insurance policy, leading to notice being returned as not deliverable and unable to be forwarded, even though the auditor did not post notice on the property, where the auditor remailed notice by first class, the auditor published notice in multiple ways and mailed postsale and issuance-of-tax-deed notices, the auditor engaged a title company to conduct a search of the chain of title, secretary of state records, and the phonebook, and the auditor also sent notices to the previous owner of record.

Ind.—[Marion County Auditor v. Sawmill Creek, LLC, 964 N.E.2d 213 \(Ind. 2012\)](#).

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§ 2325. Notice—Who is entitled to notice

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4148

Prior to conducting a tax sale, notice must be provided to one who may be deprived of a property interest.

Prior to conducting a tax sale, notice must be provided to one who may be deprived of a property interest.¹ Because a mortgagee possesses a substantial property interest that is significantly affected by a tax sale, due process entitles the mortgagee to notice reasonably calculated to apprise him or her of a pending tax sale.² Also, mechanics' lienholders have a sufficiently substantial property interest as to give them a due process entitlement to personalized notice of a tax sale of the subject property.³ Where the property owner is a corporation whose corporate status had been forfeited, the trustee of the former corporation is entitled to notice of a tax sale.⁴

It is not necessary to have a duly recorded written instrument to be the owner of land entitled under the Due Process Clause to notice of a tax sale.⁵

When there are multiple owners of a piece of property, due process entitles each owner to notice of the government's foreclosure proceedings based on nonpayment of taxes.⁶ The failure to provide the requisite notice of a tax sale to each co-owner of record of immovable property results in a denial of due process as to all co-owners and renders the tax sale null and void in its entirety with regard to all co-owners, including a co-owner who received notice of the tax sale.⁷

Due process rights to notice of a tax sale do not vary depending on the value of one's property; so long as the nature of the property interest is substantial, the actual amount at stake can be any size so long as it is not de minimis.⁸

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Footnotes

1 Ind.—[Farmers Mut. Ins. Co. of Grant and Blackford Counties v. M Jewell, LLC](#), 992 N.E.2d 751 (Ind. Ct. App. 2013), transfer denied, 999 N.E.2d 416 (Ind. 2013).

2 Ind.—[M & M Investment Group, LLC v. Ahlemeyer Farms, Inc.](#), 994 N.E.2d 1108 (Ind. 2013).

3 Mo.—[Collector of Revenue by and through the Director of Collections for Jackson County v. Parcels of Land Encumbered with Delinquent Land Tax Liens](#), 453 S.W.3d 746 (Mo. 2015).

4 D.C.—[CCD-SAT, Inc. v. Pratt](#), 972 A.2d 322 (D.C. 2009).

5 Ark.—[Rylwell, LLC v. Men Holdings 2, LLC](#), 2014 Ark. 522, 452 S.W.3d 96 (2014).

6 Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).

7 La.—[C & C Energy, L.L.C. v. Cody Investments, L.L.C.](#), 41 So. 3d 1134 (La. 2010).

8 Mo.—[Collector of Revenue by and through the Director of Collections for Jackson County v. Parcels of Land Encumbered with Delinquent Land Tax Liens](#), 453 S.W.3d 746 (Mo. 2015).

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16D C.J.S. Constitutional Law § 2326

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§ 2326. Hearing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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West's Key Number Digest, [Constitutional Law](#)  4148

Before the State may take property and sell it for unpaid taxes, the Due Process Clause requires the government to provide the property owner with the opportunity for a hearing appropriate to the nature of the case.

Before the State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the property owner with the opportunity for a hearing appropriate to the nature of the case.¹

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Footnotes

¹ U.S.—[Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); [Oneida Indian Nation of New York v. Madison County](#), 665 F.3d 408 (2d Cir. 2011), cert. dismissed, 134 S. Ct. 1582, 188 L. Ed. 2d 589 (2014); [Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.](#), 661 F.3d 354 (8th Cir. 2011). Ark.—[Rylwell, LLC v. Men Holdings 2, LLC](#), 2014 Ark. 522, 452 S.W.3d 96 (2014).

Ind.—[Marion County Auditor v. Sawmill Creek, LLC](#), 964 N.E.2d 213 (Ind. 2012).

Me.—[Stoops v. Nelson](#), 2013 ME 27, 61 A.3d 705 (Me. 2013).

Mich.—[Sidun v. Wayne County Treasurer](#), 481 Mich. 503, 751 N.W.2d 453 (2008).

No due process violation

Delinquent taxpayers were not deprived of an opportunity for a hearing appropriate to the nature of the case, in an action in which they sought to recover property sold at a tax sale to justify unpaid taxes, where the taxpayers did not challenge the individual components of the redemption amount, which included the purchase price, unpaid taxes, costs, and penalties, and did not claim that they could repay the new owner's purchase price.

Ga.—[Saffo v. Foxworthy, Inc.](#), 286 Ga. 284, 687 S.E.2d 463 (2009).

Failure to provide meaningful opportunity to be heard

A provision of a statute governing quiet title actions brought by purchasers of real property under tax deeds, which permitted a prior owner who failed to make the required deposit of back taxes and other related expenses to show cause why such a payment should not be made, did not provide the prior owner with the constitutionally mandated meaningful opportunity to be heard prior to the permanent transfer of title where the hearing only permitted the prior owner to explain a failure to make payment and did not allow for presentation of possible defenses to the quiet title action.

Mont.—[Ball v. Gee](#), 243 Mont. 406, 795 P.2d 82 (1990).

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§ 2327. Income taxes, generally

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West's Key Number Digest

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Due process requires that income attributed to the state for tax purposes must be rationally related to values connected with the taxing state.

Due process requires that income attributed to the state for tax purposes must be rationally related to values connected with the taxing state.¹ The inquiry is whether the taxing power exerted by the State bears a fiscal relation to protection, opportunities, and benefits given by the State.²

The constitutional guarantee of due process of law is not violated by the imposition of an income tax which operates uniformly on all incomes in the same class³ where the classification of categories of income to be taxed is reasonable.⁴ A federal income tax law is not to be declared unconstitutional as violative of the Fifth Amendment because it affects taxpayers in different states differently, due to differences in the laws of the states.⁵

The retroactive imposition of an income tax⁶ or the prohibition of a retroactive tax refund⁷ does not necessarily infringe due process. For example, it does not do so where it results in no unjust discrimination between taxpayers similarly situated,⁸ or where it is made retroactive for a short period of time,⁹ or where it is made retroactive to recent transactions.¹⁰

Statutory provisions imposing higher tax rates on certain married taxpayers whose spouses have significant separate income,¹¹ and higher rates on unmarried taxpayers than a married couple with the same income,¹² do not violate due process.

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Footnotes

1 U.S.—[Fond du Lac Band of Lake Superior Chippewa v. Frans](#), 649 F.3d 849 (8th Cir. 2011).
Del.—[Lehman Bros. Bank, FSB v. State Bank Com'r](#), 937 A.2d 95 (Del. 2007), as modified, (Nov. 9, 2007).
Me.—[Gannett Co., Inc. v. State Tax Assessor](#), 2008 ME 171, 959 A.2d 741 (Me. 2008).
Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury](#), 437 Md. 492, 87 A.3d 1263 (2014).
Mich.—[Malpass v. Department of Treasury](#), 494 Mich. 237, 833 N.W.2d 272 (2013).
Tenn.—[Blue Bell Creameries, LP v. Roberts](#), 333 S.W.3d 59, 74 A.L.R.6th 613 (Tenn. 2011).
As to taxation of income from sources within and without a jurisdiction, see § 2330.

2 Del.—[Lehman Bros. Bank, FSB v. State Bank Com'r](#), 937 A.2d 95 (Del. 2007), as modified, (Nov. 9, 2007).

3 U.S.—[Alaska SS Co. v. Mullaney](#), 12 Alaska 594, 180 F.2d 805 (9th Cir. 1950).
Md.—[Oursler v. Tawes](#), 178 Md. 471, 13 A.2d 763 (1940).
Ohio—[Stockwell v. City of Columbus](#), 39 Ohio Op. 499, 55 Ohio L. Abs. 168, 86 N.E.2d 822 (C.P. 1949).

4 Conn.—[Miller v. Heffernan](#), 173 Conn. 506, 378 A.2d 572 (1977).
Ill.—[Thorpe v. Mahin](#), 43 Ill. 2d 36, 250 N.E.2d 633 (1969).

5 U.S.—[B.F. Sturtevant Co. v. Commissioner of Internal Revenue](#), 75 F.2d 316 (C.C.A. 1st Cir. 1935).

6 U.S.—[First Nat. Bank in Dallas v. U. S.](#), 190 Ct. Cl. 400, 420 F.2d 725 (1970).
Conn.—[Kellems v. Brown](#), 163 Conn. 478, 313 A.2d 53 (1972).
Ohio—[Chope v. Collins](#), 48 Ohio St. 2d 297, 2 Ohio Op. 3d 442, 358 N.E.2d 573 (1976).

7 Ky.—[Miller v. Johnson Controls, Inc.](#), 296 S.W.3d 392 (Ky. 2009).

8 U.S.—[Heineman v. U.S.](#), 72 Ct. Cl. 584, 52 F.2d 1035 (1931).

9 U.S.—[Westwick v. C. I. R.](#), 636 F.2d 291 (10th Cir. 1980).

Deduction for capital gains unconstitutional
A provision allowing only a certain percentage deduction for net long-term capital gains was unconstitutional, insofar as it applied retroactively to the income tax liability of an *inter vivos* trust, since, although retroactivity provisions in tax statutes, if for a short period, are generally valid, the apparent absence of a persuasive reason for retroactivity, with its potentially harsh effects, offended constitutional limits, especially when the tax imposed was one which might exert significant influence on personal or business transactions.

10 N.Y.—[Holly S. Clarendon Trust v. State Tax Commission](#), 43 N.Y.2d 933, 403 N.Y.S.2d 891, 374 N.E.2d 1242 (1978).
N.J.—[Klebanow v. Glaser](#), 159 N.J. Super. 596, 388 A.2d 1015 (App. Div. 1978), judgment aff'd, 80 N.J. 367, 403 A.2d 897 (1979).

11 U.S.—[Johnson v. U.S.](#), 422 F. Supp. 958 (N.D. Ind. 1976), judgment aff'd, 550 F.2d 1239 (7th Cir. 1977).
U.S.—[Jansen v. U.S.](#), 441 F. Supp. 20 (D. Minn. 1977), judgment aff'd, 567 F.2d 828 (8th Cir. 1977).

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Due process of law is denied in taxing one person for the income of another; however, the undistributed share of partnership profits may be subject to an income tax.

The Due Process Clause is offended by arbitrarily requiring the inclusion as income of that which is not, and which the taxpayer cannot make, part of his or her income¹ or by taxing one person for the income of another.² On the other hand, without violating due process, the undistributed share of partnership profits may be subject to an income tax³ and payments to a partner for services may be made includable in the partner's distributive share of partnership income.⁴

Income tax laws may, without any violation of due process, provide for the taxation of gains or deduction of losses resulting from a sale or other disposition of property.⁵ A provision that the basis for determining a gain or loss on the sale of property acquired by gift is the cost to the donor or the last owner not acquiring by gift does not deny due process.⁶

Corporate stock purchased pursuant to an employee stock option and subject to certain restrictions may constitutionally be taxed at its fair market value.⁷

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Footnotes

1 U.S.—[Reinecke v. Smith](#), 61 F.2d 324 (C.C.A. 7th Cir. 1932).

2 U.S.—[Hooper v. Tax Commission of Wis.](#), 284 U.S. 206, 52 S. Ct. 120, 76 L. Ed. 248, 78 A.L.R. 346 (1931); [Albanese D'Imperio v. Secretary of the Treasury of Puerto Rico](#), 223 F.2d 413 (1st Cir. 1955); [Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico](#), 142 F.2d 11 (C.C.A. 1st Cir. 1944).

Husband and wife domiciled in different states

When a wife was domiciled in Idaho and a husband was domiciled in Nevada, Idaho's taxation of the wife's one-half interest in the husband's Nevada earnings did not violate due process, where the wife derived income from her one-half interest in the husband's earnings in Nevada, the wife was supplied many services by the state, and there was nothing in the Constitution to prevent the state from taxing her income in return, regardless of the fact that the income was derived from a source outside of the state, and in taxing one-half of the husband's Nevada earnings, the State Tax Commission was not seeking to impose a tax on the husband, but rather on the wife.

Idaho—[Parker v. Idaho State Tax Com'n](#), 148 Idaho 842, 230 P.3d 734 (2010).

As to taxation of multistate corporations as unitary businesses, see § 2331.

3 U.S.—[Ballester v. Descartes](#), 181 F.2d 823 (1st Cir. 1950).

4 N.Y.—[Yohalem v. State Tax Commission](#), 70 A.D.2d 996, 417 N.Y.S.2d 816 (3d Dep't 1979).

5 U.S.—[Fesler v. Commissioner of Internal Revenue](#), 38 F.2d 155 (C.C.A. 7th Cir. 1930).

Okla.—[Essley v. Oklahoma Tax Com'n](#), 1946 OK 44, 196 Okla. 473, 168 P.2d 111 (1946).

Wis.—[First Wisconsin Trust Co. v. Wisconsin Dept. of Taxation](#), 237 Wis. 135, 294 N.W. 868 (1940).

6 U.S.—[Cooper v. U.S.](#), 280 U.S. 409, 50 S. Ct. 164, 74 L. Ed. 516 (1930).

7 U.S.—[Pledger v. C. I. R.](#), 641 F.2d 287 (5th Cir. 1981).

Combating tax avoidance

Congress is not required to take each and every restriction on stock into account in combating tax avoidance by employees receiving stock as compensation for their services or to make equally difficult individual evaluations which depend upon the parties' subjective intentions; rather, the Fifth Amendment permits the line drawn to be a rough one, with the intent of realistically solving a practical problem, by making a gross accommodation to economic reality.

U.S.—[Sakol v. C. I. R.](#), 574 F.2d 694 (2d Cir. 1978).

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The income of a revocable trust may be taxed to the grantor without any denial of due process, and a beneficiary may be taxed on the income from a trust.

The income of a revocable trust may be taxed to the grantor without any denial of due process,¹ and a beneficiary may be taxed on the income from a trust.²

The Due Process Clause does not prevent the taxing of the income of a resident of the state from a trust administered under the laws of another state³ notwithstanding the fact that the trustee is required to pay a tax on the income in such other state.⁴ On the other hand, the corpus of a trust fund in the hands of a trustee in one state cannot be taxed in another state in which the life beneficiary resides.⁵ Under the Due Process Clause, the alleged absence of conduct constituting a purposeful direction at the taxing state is not fatal to the state's power to tax undistributed income of a resident *inter vivos* trust, in a case in which

the trustees, trust assets, and administration are located outside of the state's borders, where a noncontingent beneficiary of the trust is a state domiciliary during the tax year in question.⁶

CUMULATIVE SUPPLEMENT

Cases:

When a tax on trust assets is premised on the in-state residence of a beneficiary, the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset; otherwise, the State's relationship to the object of its tax is too attenuated to create the minimum connection that the Constitution's Due Process Clause requires. [U.S. Const. Amend. 14. North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 \(2019\)](#).

In-state residence of beneficiaries for trust that was formed in another state did not, by itself, supply the minimum connection with North Carolina to support the State's imposition of tax on trust income, and thus the State's tax as applied to the trust violated Due Process Clause; beneficiaries received no income from the trust, had no right to demand income from the trust, under which distribution of trust assets was left to trustee's absolute discretion, and had no assurance that they would eventually receive a specific share of trust income. [U.S. Const. Amend. 14; N.C. Gen. Stat. Ann. § 105-160.2. North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 \(2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Reinecke v. Smith, 289 U.S. 172, 53 S. Ct. 570, 77 L. Ed. 1109 \(1933\); Helvering v. Dunning, 118 F.2d 341 \(C.A. 4th Cir. 1941\)](#).

Wis.—[First Wisconsin Trust Co. v. Wisconsin Dept. of Taxation, 237 Wis. 135, 294 N.W. 868 \(1940\)](#).

2 U.S.—[Milleg v. U.S., 94 F. Supp. 658 \(E.D. N.Y. 1950\)](#).

3 U.S.—[Greenough v. Tax Assessors of City of Newport, 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621, 172 A.L.R. 329 \(1947\); Guaranty Trust Co. of N.Y. v. Com. of Va., 305 U.S. 19, 59 S. Ct. 1, 83 L. Ed. 16 \(1938\)](#).

Broad due process inquiry

The broad due process inquiry into whether a state could impose an income tax on resident testamentary trusts in which the trustees, trust assets, and administration were located outside of the state's borders was whether the taxing power exerted by the state bore a fiscal relation to protection, opportunities, and benefits given by the State; the simple, but controlling, question was whether the State gave anything for which it could ask a return.

Conn.—[Chase Manhattan Bank v. Gavin, 249 Conn. 172, 733 A.2d 782 \(1999\)](#).

As to taxation of income from sources within and without a jurisdiction, see [§ 2330](#).

4 U.S.—[Guaranty Trust Co. of N.Y. v. Com. of Va., 305 U.S. 19, 59 S. Ct. 1, 83 L. Ed. 16 \(1938\)](#).

5 U.S.—[Brooke v. City of Norfolk, 277 U.S. 27, 48 S. Ct. 422, 72 L. Ed. 767 \(1928\)](#).

6 Conn.—[Chase Manhattan Bank v. Gavin, 249 Conn. 172, 733 A.2d 782 \(1999\)](#).

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§ 2330. Income from sources within or without jurisdiction

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A state may, consistent with the Due Process Clause, tax the income of its residents, regardless of where that income is earned, and tax nonresidents when that income has been derived from property present in the taxing state, but taxation on value earned outside a state's borders is prohibited.

A state may, consistent with the Due Process Clause, tax the income of its residents regardless of where that income is earned.¹ Due process considerations likewise do not bar enforcement of an income tax assessed against nonresidents when that income has been derived from property present in the taxing state.² Thus, nonresident persons or foreign corporations may be taxed on incomes arising from property or from any business, trade, profession, or occupation carried on within a state's borders.³ However, the Due Process and Commerce Clauses of the United States Constitution generally prohibit a state from imposing a tax on value earned outside its borders.⁴

Under the Due Process and Commerce Clauses of the United States Constitution, states may tax income that is earned elsewhere only if there is some definite link, or some minimum connection, between the taxing state and the person, property, or transaction it seeks to tax.⁵ The Due Process and Commerce Clauses thus do not permit a state to tax a corporation's property, income, or gross receipts unless there is a link between the state and the corporation's activities within the state.⁶ The nexus required for due process for an income-based tax is merely the purposeful direction of activities to the state.⁷ The tax imposed must bear a fiscal relation to opportunities which the state has given, to protection which it has afforded, or to benefits which it has conferred by the fact of being an orderly, civilized society.⁸ It is implicit in the due process test that benefits afforded by a state to a domiciliary, or its functional equivalent, justifying taxation of its income, must generally span the time period during which the income was earned and not solely antedate that time period without any continuing effect.⁹

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Footnotes

1 Md.—[Maryland State Comptroller of Treasury v. Wynne](#), 431 Md. 147, 64 A.3d 453 (2013), cert. granted, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014).

2 Mass.—[Truck Renting and Leasing Ass'n, Inc. v. Commissioner of Revenue](#), 433 Mass. 733, 746 N.E.2d 143 (2001).

3 U.S.—[Travis v. Yale & Towne Mfg. Co.](#), 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920).

Ind.—[Clark v. Lee](#), 273 Ind. 572, 406 N.E.2d 646 (1980).

Md.—[Maryland State Comptroller of Treasury v. Wynne](#), 431 Md. 147, 64 A.3d 453 (2013), cert. granted, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014).

N.Y.—[Colleary v. Tully](#), 69 A.D.2d 922, 415 N.Y.S.2d 266 (3d Dep't 1979).

4 Alaska—[Tesoro Corp. v. State, Dept. of Revenue](#), 312 P.3d 830 (Alaska 2013), cert. denied, 134 S. Ct. 2697, 189 L. Ed. 2d 740 (2014).

Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury](#), 437 Md. 492, 87 A.3d 1263 (2014).

Mass.—[General Mills, Inc. v. Commissioner of Revenue](#), 440 Mass. 154, 795 N.E.2d 552 (2003).

Mo.—[Medicine Shoppe Intern., Inc. v. Director of Revenue](#), 75 S.W.3d 731 (Mo. 2002), as modified on denial of reh'g, (May 28, 2002).

N.Y.—[Zelinsky v. Tax Appeals Tribunal of State](#), 1 N.Y.3d 85, 769 N.Y.S.2d 464, 801 N.E.2d 840 (2003).

Pa.—[Glatfelter Pulpwood Co. v. Com.](#), 619 Pa. 243, 61 A.3d 993 (2013).

5 Or.—[Pennzoil Co. v. Department of Revenue](#), 332 Or. 542, 33 P.3d 314 (2001).

Taxation of wages of nonresidents

The nexus required by the Due Process Clause and Commerce Clause for a state to tax wages of nonresidents is concerned primarily with the quality of the connections an individual or business entity has with a state, not with the quantity of the individual's or entity's income; "minimum connections" does not mean minimum income.

Idaho—[Blangers v. State, Dept. of Revenue and Taxation](#), 114 Idaho 944, 763 P.2d 1052 (1988).

As to minimum contacts and taxing out-of-state activities, generally, see §§ 2310 to 2313.

6 Kan.—[In re National Co-op. Refinery Ass'n](#), 273 Kan. 500, 44 P.3d 398 (2002).

Taxation of nonresident shareholders

(1) Nonresident shareholders of in-state corporations avail themselves of the taxing state's benefits, protections, and opportunities by earning income in the state through their respective corporations, thus providing the state the "minimum contacts" with the shareholders that is required under the Due Process Clause to justify taxing them on their distributive share of the income.

Ohio—[Aglev v. Tracy](#), 87 Ohio St. 3d 265, 1999-Ohio-61, 719 N.E.2d 951 (1999).

(2) Under the Due Process Clause, the State had jurisdiction to tax dividend income received by a nonresident shareholder of a real estate investment trust (REIT), where the dividends represented rental income of retail stores in the state, the State provided benefits and protections and helped to create the income, and the nexus with the State was not broken by the pass-through nature of the REIT.

La.—[Bridges v. Autozone Properties, Inc.](#), 900 So. 2d 784 (La. 2005).

Taxation of shareholder of Subchapter S corporation

Failure to permit Missouri resident shareholders of a Subchapter S corporation to reduce income on their tax returns on account of sales made totally or partially outside the state does not violate the Commerce Clause or the constitutional guarantees of due process or equal protection; a corporation voluntarily elects to assume S corporation status and can elect to be taxed as other corporations, in which case the income would be apportioned.

Mo.—[Wolff v. Director of Revenue](#), 791 S.W.2d 390 (Mo. 1990).

7 N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).

8 N.Y.—[Zelinsky v. Tax Appeals Tribunal of State](#), 1 N.Y.3d 85, 769 N.Y.S.2d 464, 801 N.E.2d 840 (2003).

Exact relation to services provided not required

While universal income taxation is justified by the protections and services provided by the state of residency, neither the Due Process Clause nor the Commerce Clause requires that the tax bear an exact relation to the services actually provided to the individual taxpayer.

N.Y.—[Tamagni v. Tax Appeals Tribunal of State](#), 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125 (1998).

9 Conn.—[Chase Manhattan Bank v. Gavin](#), 249 Conn. 172, 733 A.2d 782 (1999).

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§ 2331. Income from sources within or without jurisdiction—Apportionment

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There are constitutional limitations on state taxation of income generated by the interstate activities of a unitary business, and a state may apply an apportionment formula to tax the appropriate proportional share of the interstate income of the business.

There are constitutional limitations on state taxation of income generated by the interstate activities of a unitary business.¹ Under the unitary business principle, by which a state may tax a portion of the value that a unitary business derives from its operation within the state,² due process requires: (1) showing the existence of a unitary business, part of which is carried on in the taxing state, and (2) demonstrating a rational relationship between the taxing state and the intrastate values of the taxpayer's enterprise.³ The unitary business principle permits a state to apportionably tax a nondomiciliary corporation on income received from a subsidiary, even if the subsidiary does no business in the taxing state, provided the income is attributable to the subsidiary's operational involvement in the parent's interstate business that is subject to apportionable taxation by the state.⁴ A state may not, however, tax a nondomiciliary corporation's income that is derived from a subsidiary's unrelated business activity that

constitutes a discrete business enterprise.⁵ Although the Due Process and Commerce Clauses permit the inclusion of the income of foreign members of a unitary group for tax purposes, a state may adopt the "water's edge" model, meaning not outside the geographic boundaries of the United States, of combined reporting, which includes only the income of domestic members of the unitary group.⁶

In determining whether a state's attempt to tax a nondomiciliary corporation's income is consistent with the Commerce Clause and Due Process Clause, the relevant unitary business inquiry is whether a corporate principal, in pursuing maximum profits, has treated particular intangible assets as serving an investment function or an operational function.⁷ The inquiry focuses on the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing state.⁸ The mere fact that an intangible asset is acquired by a nondomiciliary corporation pursuant to a long-term corporate strategy of acquisitions and dispositions does not convert an otherwise passive investment into an integral operational one, such that the taxing state can include the gain from the sale of the asset in the corporate taxpayer's apportionable tax base consistent with the Commerce Clause and the Due Process Clause.⁹

Once the constitutional requirements are met, the taxing state may then apply an apportionment formula to tax the appropriate proportional share of the interstate income of the business.¹⁰ Under both the Due Process and Commerce Clauses, the application of an apportionment formula to the income of a multistate unitary business must be fair.¹¹ The two elements of fairness are: (1) internal consistency, that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed, and (2) external consistency, the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated.¹² The test for internal consistency posits a situation in which every jurisdiction applies the tax at issue; the test then determines whether, under such circumstances, more than 100% of the taxpayer's income would be subject to taxation.¹³

CUMULATIVE SUPPLEMENT

Cases:

Foreign subsidiary company lacked economic substance as business entity separate from parent company, and thus there was sufficient nexus and minimum contacts to justify, under Due Process Clause and Commerce Clause, Maryland's taxation of portion of subsidiary's income produced from parent's business activity in Maryland, where subsidiary depended for vast majority of its annual revenue on royalty payments from parent and parent's other subsidiaries, subsidiary relied on parent for most, if not all, of its administrative functions, there was circular flow of money from parent and other subsidiaries to subsidiary and back to parent, and subsidiary was functionally integrated with and controlled by parent through stock ownership and common employees, directors and officers. [U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 14. ConAgra Foods RDM, Inc. v. Comptroller of Treasury, 241 Md. App. 547, 211 A.3d 611 \(2019\).](#)

Although the existence of a unitary relation between the payor of a capital transaction and the payee is one means of meeting the due process requirement for a state to tax income, it is not the only means; if the capital transaction serves an operational rather than an investment function, a state may apply an apportionment formula to tax the transaction. [U.S. Const. Amend. 14. YAM Special Holdings, Inc. v. Commissioner of Revenue, 947 N.W.2d 438 \(Minn. 2020\).](#)

Nonresident taxpayer, who had incurred capital gain in selling controlling interest in limited liability company (LLC) that did business in Ohio, failed to demonstrate that statute imposing income tax on capital gain realized by an out-of-state investor in a pass-through entity based on an apportionment of the capital gain to Ohio was facially unconstitutional under Due Process Clause; there was at least a possibility that statute could be applied when unitary-business situation was present, and taxpayer

did not assert that his own activities amounted to unitary business with LLC. [U.S.C.A. Const. Amend. 14](#); R.C. § 5747.212. [Corrigan v. Testa](#), 149 Ohio St. 3d 18, 2016-Ohio-2805, 73 N.E.3d 381 (2016).

[END OF SUPPLEMENT]

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Footnotes

1 Me.—[Gannett Co., Inc. v. State Tax Assessor](#), 2008 ME 171, 959 A.2d 741 (Me. 2008).

2 Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury](#), 437 Md. 492, 87 A.3d 1263 (2014).

3 Tenn.—[Blue Bell Creameries, LP v. Roberts](#), 333 S.W.3d 59, 74 A.L.R.6th 613 (Tenn. 2011).

4 Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury](#), 437 Md. 492, 87 A.3d 1263 (2014).

As to the requirement of minimum contacts, generally, see [§ 2310](#).

As to the rational relationship requirement, see [§ 2327](#).

Mass.—[General Mills, Inc. v. Commissioner of Revenue](#), 440 Mass. 154, 795 N.E.2d 552 (2003).

Tenn.—[Blue Bell Creameries, LP v. Roberts](#), 333 S.W.3d 59, 74 A.L.R.6th 613 (Tenn. 2011) (parent did not conduct any business operations of its own).

Patent subsidiary

Corporate subsidiaries lacked economic substance as business entities separate from the parent which did business in the state, and thus, taxation of an apportioned sum of the subsidiaries' income did not violate due process where the subsidiaries had been formed to hold the parent's patent portfolio and to manage the parent's excess capital; the patent subsidiary did not create, invent, or make anything and was required to rely on the parent to invent a new process or product; manufacture or sale of the product by the parent obligated the payment of royalties to the subsidiary under a license agreement; the subsidiaries were dependent on the parent for income; a circular flow of money existed between the parent and the subsidiaries; and there was a general absence of substantive activity from either subsidiary that was in any meaningful way separate from the parent.

Md.—[Gore Enterprise Holdings, Inc. v. Comptroller of Treasury](#), 437 Md. 492, 87 A.3d 1263 (2014).

5 Mass.—[General Mills, Inc. v. Commissioner of Revenue](#), 440 Mass. 154, 795 N.E.2d 552 (2003).

Subsidiaries operated as discrete business enterprises

(1) Foreign subsidiaries were not part of a unitary business and, thus, a state's tax on a portion of the dividends received by a parent corporation from the subsidiaries did not bear the necessary relationship to opportunities, benefits, or protection conferred or afforded by the taxing state and failed to meet established due process standards, where the subsidiaries engaged exclusively in the business of retailing, no phase of any subsidiary's business was integrated with the parent's; the enterprise engaged in no centralized purchasing, manufacturing, or warehousing; and there was little centralization of management, even though there were some common directors and major financial decisions had to be approved by parent.

U.S.—[F. W. Woolworth Co. v. Taxation and Revenue Dept. of State of N. M.](#), 458 U.S. 354, 102 S. Ct. 3128, 73 L. Ed. 2d 819 (1982).

(2) An attempt by a state to levy an income tax on a portion of the dividends received by a nondomiciliary corporation from subsidiaries was not properly within the reach of a state's taxing power under the Due Process Clause, even though the dividend-paying subsidiaries added to the riches of the parent corporation, where they were discrete business enterprises that in any business or economic sense had nothing to do with activities in the state.

U.S.—[ASARCO Inc. v. Idaho State Tax Com'n](#), 458 U.S. 307, 102 S. Ct. 3103, 73 L. Ed. 2d 787 (1982).

6 Minn.—[Manpower, Inc. v. Commissioner of Revenue](#), 724 N.W.2d 526 (Minn. 2006).

7 U.S.—[Allied-Signal, Inc. v. Director, Div. of Taxation](#), 504 U.S. 768, 112 S. Ct. 2251, 119 L. Ed. 2d 533 (1992).

8 U.S.—[Allied-Signal, Inc. v. Director, Div. of Taxation](#), 504 U.S. 768, 112 S. Ct. 2251, 119 L. Ed. 2d 533 (1992).

9 U.S.—[Allied-Signal, Inc. v. Director, Div. of Taxation](#), 504 U.S. 768, 112 S. Ct. 2251, 119 L. Ed. 2d 533 (1992).

Payments under licensing agreement insufficient

An out-of-state corporation that licensed trademarks and other intellectual property to a restaurant chain and that received revenue based on a percentage of sales from the restaurant chain's sublicensees who used the trademarks and intellectual property in the state did not have a sufficient connection with the state to permit the state tax commission to assess corporate income tax on such revenue as a matter of due process, where the out-of-state corporation did not have a physical presence or do business in the state, and the restaurant chain's payments to the corporation under a licensing agreement did not depend upon the receipt of payments from the sublicensees.

Okla.—[Scioto Ins. Co. v. Oklahoma Tax Com'n](#), 2012 OK 41, 279 P.3d 782 (Okla. 2012).

10 Alaska—[State, Dept. of Revenue v. Amoco Production Co.](#), 676 P.2d 595 (Alaska 1984).

N.Y.—[British Land \(Maryland\), Inc. v. Tax Appeals Tribunal of State of N.Y.](#), 85 N.Y.2d 139, 623 N.Y.S.2d 772, 647 N.E.2d 1280 (1995).

As to taxing out-of-state activities and apportionment, generally, see §§ [2312](#), [2313](#).

11 Alaska—[Tesoro Corp. v. State, Dept. of Revenue](#), 312 P.3d 830 (Alaska 2013), cert. denied, 134 S. Ct. 2697, 189 L. Ed. 2d 740 (2014).

Idaho—[Union Pacific Corp. v. Idaho State Tax Com'n](#), 139 Idaho 572, 83 P.3d 116 (2004).

Pa.—[Glatfelter Pulpwood Co. v. Com.](#), 619 Pa. 243, 61 A.3d 993 (2013).

Unconstitutional apportionment

A state's "Throw-Out Rule," which modified the sales fraction under the formula apportionment method of taxing multistate corporations, transforming the fraction into one that divided New Jersey receipts only by taxed receipts, operated constitutionally under the Due Process Clause and the Commerce Clause, under a fair apportionment analysis, when applied to untaxed receipts from those states that lack jurisdiction to tax the corporate taxpayer due to the insufficient business activity in that state but not when applied to receipts that are untaxed due to a state's determination not to have an income or similar business activity tax.

N.J.—[Whirlpool Properties, Inc. v. Director, Div. of Taxation](#), 208 N.J. 141, 26 A.3d 446 (2011).

12 Alaska—[Tesoro Corp. v. State, Dept. of Revenue](#), 312 P.3d 830 (Alaska 2013), cert. denied, 134 S. Ct. 2697, 189 L. Ed. 2d 740 (2014).

Mass.—[First Marblehead Corp. v. Commissioner of Revenue](#), 470 Mass. 497, 23 N.E.3d 892 (2015).

13 Alaska—[Tesoro Corp. v. State, Dept. of Revenue](#), 312 P.3d 830 (Alaska 2013), cert. denied, 134 S. Ct. 2697, 189 L. Ed. 2d 740 (2014).

Taxation in excess of 100%

Taxation in Pennsylvania of 42% of the net gain from the sale of a taxpayer's Delaware timberland did not violate the Due Process Clause, even though Delaware had imposed income taxation on 100% of the net gain, were the taxpayer was a unitary business, there was a rational relationship between the taxpayer's out-of-state timberlands, including their ultimate disposition, and the taxpayer's unitary business activities in Pennsylvania, and all of the taxpayer's sales of pulpwood were in Pennsylvania to its parent corporation for processing in Pennsylvania at the parent corporation's paper mill.

Pa.—[Glatfelter Pulpwood Co. v. Com.](#), 619 Pa. 243, 61 A.3d 993 (2013).

16D C.J.S. Constitutional Law § 2332

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

5. Particular Types of Taxes and Other Sources of Revenue

a. Income Taxes

§ 2332. Exemptions, deductions, or credit of other taxes

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Without denying due process of law, income tax statutes may provide for exemptions, deductions, or credit for other taxes.

Provided the classification is not unreasonable or arbitrary, income tax laws may, without denying due process, provide for certain exemptions.¹ For example, greater exemptions may be allowed to married than to unmarried taxpayers, and credits may be allowed individuals which are denied to corporations.²

Reasonable conditions may be imposed on the right of the taxpayer to claim certain deductions or credits.³ Statutes also may provide for reasonable credit apportionment formulas.⁴ Due process as to entitlement to a deduction or credit may be had by an informal process, and a contested hearing process is not required.⁵

Offsets, represented by payment of other taxes, may be permitted without denial of due process.⁶ However, procedures followed by the state in setting off debts owed to the state against income tax refunds must comport with due process requirements.⁷

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Footnotes

1 Ill.—[Thorpe v. Mahin](#), 43 Ill. 2d 36, 250 N.E.2d 633 (1969).
N.Y.—[Scott-Textor Productions v. Murphy](#), 34 A.D.2d 1076, 312 N.Y.S.2d 421 (3d Dep't 1970).

Retirement plan contributions
The fact that some types of private pension plan contributions and other types of government employee benefits may be excluded from income, but that contributions to a county employee retirement association could not be excluded, did not deprive a taxpayer of due process.
U.S.—[Kosmal v. C. I. R.](#), 670 F.2d 842 (9th Cir. 1982).

2 Idaho—[Diefendorf v. Gallet](#), 51 Idaho 619, 10 P.2d 307 (1932).

3 U.S.—[Commissioner of Internal Revenue v. Lafayette Life Ins. Co.](#), 67 F.2d 209 (C.C.A. 7th Cir. 1933);
[Anglim v. Acme Brewing Co.](#), 143 F.2d 412 (C.C.A. 9th Cir. 1944).

Denial of state tax deduction for federal windfall profit taxes
An "add-back" provision of a state corporate tax, denying crude oil producers a deduction of federal windfall profit taxes from their taxable income, does not violate the Due Process Clause.
U.S.—[Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dept. of Treasury](#), 490 U.S. 66, 109 S. Ct. 1617, 104 L. Ed. 2d 58 (1989).

4 Minn.—[Montgomery Ward & Co. v. Commissioner of Taxation](#), 216 Minn. 307, 12 N.W.2d 625 (1943).

5 Iowa—[Ghost Player, L.L.C. v. State](#), 860 N.W.2d 323 (Iowa 2015).

6 Wis.—[State ex rel C. Reiss Coal Co. v. Zimmermann](#), 210 Wis. 599, 247 N.W. 321 (1933).

7 Or.—[Brown v. Lobdell](#), 36 Or. App. 397, 585 P.2d 4 (1978).

Due process not violated
A statutory provision allowing municipal and county associations to seize from taxpayers' refunds a collection fee does not violate due process, absent showing that the fees charged are arbitrary or unreasonable, where a reasonable basis exists to permit disparate treatment to allow collection of a fee for claimant agencies who use the associations' services from those that do not, as the assessment of a reasonable fee from taxpayers for consolidating and processing the setoffs for claimant agencies results in cost savings and administrative convenience for both the Department of Revenue and the claimant agencies who use the associations' service.
S.C.—[Gardner v. South Carolina Dept. of Revenue](#), 353 S.C. 1, 577 S.E.2d 190 (2003).

16D C.J.S. Constitutional Law § 2333

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

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5. Particular Types of Taxes and Other Sources of Revenue

a. Income Taxes

§ 2333. Ascertainment or assessment and reassessment

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Income tax statutes may provide for the computation of the tax on a calendar or fiscal year basis and may provide for reassessment for concealment of income.

Under due process principles, the taxpayer is entitled to notice of the assessment of income taxes.¹ An assessment of income taxes based on an estimate of a taxpayer's business profits on the basis of the best information available, after the taxpayer files an essentially blank return, is not arbitrary, and there is no violation of due process.²

It is a denial of due process to measure tax on income by the income of another.³

It is no denial of due process to reassess for concealment of income.⁴ However, it is a denial of due process to deny a taxpayer a hearing on a proposed assessment of an additional income tax against him or her, and the taxpayer's affidavit of objections and the commission's denial of revision are not equivalent to a hearing.⁵

CUMULATIVE SUPPLEMENT

Cases:

Denial of administrative hearing to taxpayers, who were owners of dog breeding business, following tax raid and seizure of dogs did not violate due process, where tax court treated denial of administrative hearing as final determination, thereby allowing court's jurisdiction to be invoked. [U.S. Const. Amend. 14. Garwood v. State, 77 N.E.3d 204 \(Ind. Ct. App. 2017\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ala.—[State ex rel. Rabren v. Baxter, 46 Ala. App. 134, 239 So. 2d 206 \(Civ. App. 1970\)](#).
As to due process considerations with respect to tax assessments, generally, see §§ 2315 to 2318.
- 2 Miss.—[Middlebrook v. Mississippi State Tax Commission, 387 So. 2d 726 \(Miss. 1980\)](#).
- 3 U.S.—[Johnson v. U.S., 422 F. Supp. 958 \(N.D. Ind. 1976\)](#), judgment aff'd, [550 F.2d 1239 \(7th Cir. 1977\)](#);
[Lewis v. White, 56 F.2d 390 \(D. Mass. 1932\)](#).
- 4 La.—[Succession of Wiener, 203 La. 649, 14 So. 2d 475 \(1943\)](#).
- 5 U.S.—[Buick Motor Co. v. City of Milwaukee, Wis., 48 F.2d 801 \(C.C.A. 7th Cir. 1931\)](#).
- 5 Or.—[Dant & Russell v. Pierce, 122 Or. 337, 255 P. 603 \(1927\)](#).

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a. Income Taxes

§ 2334. Collection and enforcement

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Where an income tax statute provides proper methods of collection and enforcement, there is no denial of due process of law.

Statutes or ordinances providing for proper methods of collection and enforcement of income taxes do not deny due process of law.¹

Due process of law is not denied by imposing a lien on the property of nonresident delinquent taxpayers without limiting the lien to the property producing the income,² and the State may enforce payment of tax by nonresidents by the exercise of just control over persons and property within the state, as by garnishment of credits, or requiring the withholding at the source of the amount of the tax on incomes, which is the practical equivalent of a garnishment of credits.³ When a multistate business claims that a state income tax violates the Due Process Clause, the taxpayer has the distinct burden of showing by clear and cogent evidence that the state tax results in extraterritorial values being taxed.⁴

Statutes requiring the withholding of income taxes do not result in a taking of property without due process,⁵ and the failure of tax statutes to provide for interest on funds collected in connection with withholding and quarterly declarations is not a violation of due process.⁶

CUMULATIVE SUPPLEMENT

Cases:

IRS reasonably construed provision of statute restricting consideration of underlying liability during collection review to those who "did not otherwise have an opportunity to dispute" liability as precluding challenge to liability at collection due process (CDP) hearing when taxpayer's prior opportunity to dispute liability occurred at administrative, non-judicial proceeding, and thus court had to defer to it. [26 U.S.C.A. § 6330\(c\)\(2\)\(B\); 26 C.F.R. § 301.6330-1. Keller Tank Services II, Inc. v. Commissioner of Internal Revenue, 854 F.3d 1178 \(10th Cir. 2017\)](#).

Municipalities failed to prove that state violated prohibition against laws impairing obligation of contracts by limiting municipalities' ability to collect and administer net profit taxes on income earned within their boundaries, where municipalities failed to show or provide detailed description of allegedly impaired contracts for collecting and administering municipality's income tax. [Ohio Const. art. 2, § 28; Ohio Rev. Code Ann. §§ 718.80718.95. City of Athens v. Testa, 2019-Ohio-277, 119 N.E.3d 469 \(Ohio Ct. App. 10th Dist. Franklin County 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Colo.—[Reed v. Dolan, 195 Colo. 193, 577 P.2d 284 \(1978\)](#).
Summary procedures without notice or hearing
U.S.—[Bomher v. Reagan, 522 F.2d 1201 \(9th Cir. 1975\)](#).
Cal.—[Kanarek v. Davidson, 85 Cal. App. 3d 341, 148 Cal. Rptr. 86 \(4th Dist. 1978\)](#).
Notices of deficiency
Sending statutory notices of deficiency to a taxpayer's last known address, which was taken from the taxpayer's federal tax returns, was sufficient to satisfy due process requirements, in the state's action to collect unpaid state income taxes for five tax years, even though the notices were returned undelivered, where there was no evidence that the address was incorrect, summons for the state's lawsuit was addressed to the taxpayer at the same address, return of service indicated that the taxpayer was personally served at that address, and evidence showed only that the notices of deficiency were unclaimed, not that they were not delivered or received by the taxpayer.
Mo.—[State v. Elliott, 225 S.W.3d 423 \(Mo. 2007\)](#).
U.S.—[Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445 \(1920\)](#).
U.S.—[Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 \(1920\)](#).
Pa.—[Glatfelter Pulpwood Co. v. Com., 619 Pa. 243, 61 A.3d 993 \(2013\)](#).
As to income from sources within or without the jurisdiction, see §§ 2330, 2331.
U.S.—[U.S. v. Smith, 484 F.2d 8 \(10th Cir. 1973\)](#); [U.S. v. Roberts, 425 F. Supp. 1281 \(D. Del. 1977\)](#); [U.S. v. Shimek, 445 F. Supp. 884 \(M.D. Pa. 1978\)](#).
Ill.—[Sherman-Reynolds, Inc. v. Mahin, 47 Ill. 2d 323, 265 N.E.2d 640 \(1970\)](#).
U.S.—[Jacobs v. Gromatsky, 494 F.2d 513 \(5th Cir. 1974\)](#).
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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

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5. Particular Types of Taxes and Other Sources of Revenue

b. Estate, Inheritance, and Gift Taxes

§ 2335. Estate, inheritance, and gift taxes, generally

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West's Key Number Digest

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Due process of law generally is not violated by estate, inheritance, or succession tax statutes, at least where they do not operate retroactively to destroy vested rights.

The prohibition against taking property without due process of law is not violated by various state¹ and federal² estate, inheritance, or succession taxes, and the statutes imposing them. However, the legislature may not provide for their determination in a manner which is arbitrary and capricious.³

A retroactive estate tax does not violate due process where it has a rational basis.⁴ Moreover, an estate tax does not operate retroactively, contrary to due process, merely because some of the facts or conditions on which its application depends came into being before enactment of the taxing statute.⁵ The Due Process Clause of the Federal Constitution places no restriction on a state as to the time at which an inheritance tax must be levied⁶ or property valued for purposes of such a tax.⁷

There can be no objection, under the Due Process Clause, to measuring the tax or fixing its rate by including in the gross estate the amount receivable by beneficiaries as insurance under policies taken out by the decedent on his or her own life.⁸

The collection of an estate tax will not violate due process unless the means employed are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property.⁹

A statute imposing a tax on gifts inter vivos is not invalid under the Due Process Clause¹⁰ because of its graduation and exemption features,¹¹ but such a statute is arbitrary and invalid insofar as it applies to gifts fully consummated prior to the date it takes effect.¹²

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Footnotes

1 Cal.—[In re Nash's Estate](#), 256 Cal. App. 2d 560, 64 Cal. Rptr. 298, 27 A.L.R.3d 1349 (2d Dist. 1967).
Iowa—[Matter of Evans' Estate](#), 255 N.W.2d 99 (Iowa 1977).

2 U.S.—[Gottlieb v. White](#), 69 F.2d 792 (C.C.A. 1st Cir. 1934).

Corpus of trust subject to revocation, alteration, or amendment

U.S.—[Helvering v. City Bank Farmers Trust Co.](#), 296 U.S. 85, 56 S. Ct. 70, 80 L. Ed. 62 (1935).

3 Idaho—[West v. Tax Commission](#), 99 Idaho 26, 576 P.2d 1060 (1978).

4 Wash.—[In re Estate of Hambleton](#), 181 Wash. 2d 802, 335 P.3d 398 (2014) (the purpose of the amendment was to restore parity between married couples and unmarried individuals).

5 U.S.—[U.S. v. Manufacturers Nat. Bank of Detroit](#), 363 U.S. 194, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960);
[U.S. v. Jacobs](#), 306 U.S. 363, 59 S. Ct. 551, 83 L. Ed. 763 (1939).

6 U.S.—[Central Hanover Bank & Trust Co. v. Kelly](#), 319 U.S. 94, 63 S. Ct. 945, 87 L. Ed. 1282 (1943);
[Salomon v. State Tax Commission of New York](#), 278 U.S. 484, 49 S. Ct. 192, 73 L. Ed. 464 (1929).
Wash.—[In re Estate of Hambleton](#), 181 Wash. 2d 802, 335 P.3d 398 (2014) (eight-year period of retroactivity did not violate due process).

At death of settlor of trust

U.S.—[Central Hanover Bank & Trust Co. v. Kelly](#), 319 U.S. 94, 63 S. Ct. 945, 87 L. Ed. 1282 (1943).

Mont.—[In re Kohrs' Estate](#), 122 Mont. 145, 199 P.2d 856, 5 A.L.R.2d 1046 (1948).

7 U.S.—[Salomon v. State Tax Commission of New York](#), 278 U.S. 484, 49 S. Ct. 192, 73 L. Ed. 464 (1929).

8 U.S.—[Chase Nat. Bank of City of New York v. U.S.](#), 278 U.S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A.L.R. 388 (1929); [U.S. Trust Co. of New York v. Commissioner of Internal Revenue](#), 98 F.2d 734 (C.C.A. 2d Cir. 1938), judgment aff'd, 307 U.S. 57, 59 S. Ct. 692, 83 L. Ed. 1104 (1939).

Proceeds attributable to premiums paid

Where an insured took out policies on his life and divested all interest therein, and subsequently a statute was enacted requiring inclusion of the insurance proceeds in the gross estate of the insured where the proceeds were receivable by beneficiaries other than the executor, but attributable to premiums paid by the insured, the mere fact that the insured was faced then with the alternative that he could stop paying premiums, in which case the policies would be destroyed, or that he could continue paying premiums, in which case they would be included in his estate, did not show that lawmakers had done a wholly arbitrary thing or laid a burden on an unrelated privilege or benefit and hence it could not be held that the tax offended due process.

U.S.—[U.S. v. Manufacturers Nat. Bank of Detroit](#), 363 U.S. 194, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960).

9 U.S.—[U.S. v. Vohland](#), 675 F.2d 1071 (9th Cir. 1982).

10 N.M.—[Harvey v. Vigil](#), 1967-NMSC-183, 78 N.M. 303, 430 P.2d 874 (1967).

11 U.S.—[Bromley v. McCaughn](#), 280 U.S. 124, 50 S. Ct. 46, 74 L. Ed. 226 (1929).

12 U.S.—[Untermeyer v. Anderson](#), 276 U.S. 440, 48 S. Ct. 353, 72 L. Ed. 645 (1928).

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§ 2336. Exemptions and deductions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4142

A retroactive statute that grants exemptions from taxation does not constitute a denial of due process; on the other hand, a revocation of exemptions with respect to past transactions is violative of due process.

The fact that a statute granting exemptions from inheritance taxation operates retrospectively does not constitute a denial of due process.¹ Where an exemption is withdrawn as to a tax imposed on the privilege of succession before the privilege is fully exercised, there is no invasion of the Due Process Clause.² On the other hand, a revocation of exemptions with respect to past transactions is violative of due process.³

A provision against a deduction of federal taxes paid in valuing the estate subject to the state tax does not violate due process.⁴ However, a failure to permit a deduction of the amount of inheritance or transfer tax exacted by another state constitutes a denial of due process.⁵

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Footnotes

1 Tenn.—[Bank of Commerce & Trust Co. v. McLemore](#), 162 Tenn. 137, 35 S.W.2d 31 (1931).
As to exemptions from taxation as a denial of due process, generally, see [§ 2332](#).

2 Colo.—[People ex rel. Rogers v. Waterman's Estate](#), 108 Colo. 263, 116 P.2d 204 (1941).

3 N.Y.—[City Bank Farmers' Trust Co. v. New York Cent. R. Co.](#), 253 N.Y. 49, 170 N.E. 489, 69 A.L.R. 940 (1930).

4 Cal.—[Estate of Koerner](#), 44 Cal. App. 3d 447, 118 Cal. Rptr. 752 (2d Dist. 1975).
Conn.—[Watrous v. Connelly](#), 141 Conn. 257, 105 A.2d 654 (1954).

5 U.S.—[Frick v. Com. of Pennsylvania](#), 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1925).
N.Y.—[In re Scott's Estate](#), 129 Misc. 625, 222 N.Y.S. 515 (Sur. Ct. 1927).

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§ 2337. Jurisdiction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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A state cannot constitutionally impose an inheritance or succession tax where it is without jurisdiction.

A state cannot constitutionally impose an inheritance or succession tax where it is without jurisdiction, for this would constitute a taking of property without due process of law.¹ On the other hand, a state may, consistent with due process, impose an inheritance or succession tax on tangible property within the state, whether belonging to deceased residents or nonresidents, and on intangible property belonging to deceased residents or nonresidents.² Likewise, the Due Process Clause of the Fifth Amendment does not deprive the federal government of jurisdiction to levy an estate tax on stocks, bonds, or other securities of a nonresident decedent, where such securities or evidence thereof are physically present in the United States.³

Due process is not violated by requiring the inclusion in the decedent's gross estate, for state inheritance tax purposes, of the value of certain property located outside the taxing state over which the decedent held an unexercised special power of appointment.⁴ An estate or inheritance tax on intangible property may validly be imposed by a state of which the decedent owner was not a

resident, where it has dominion over the tangibles or persons whose relationships are the source of the intangible property or where it has extended benefits or protection to the intangible property.⁵

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Footnotes

1 U.S.—[Rhode Island Hospital Trust Co. v. Doughton](#), 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926).

Violation of due process shown

Municipal inheritance tax ordinances violated due process insofar as they attempted to levy a tax on tangible movables that had acquired a situs outside the city at the time of the owner's death even though the owner was domiciled in the city at that time.

La.—[Hildebrand v. City of New Orleans](#), 549 So. 2d 1218 (La. 1989).

2 Mont.—[Matter of Ward's Estate](#), 168 Mont. 396, 543 P.2d 382 (1975).

Measure of tax

A statute adopting as the measure of tax the proportion which the specified local property bears to the entire estate of the nonresident decedent is not violative of due process.

U.S.—[Maxwell v. Bugbee](#), 250 U.S. 525, 40 S. Ct. 2, 63 L. Ed. 1124 (1919).

N.C.—[Rigby v. Clayton](#), 274 N.C. 465, 164 S.E.2d 7 (1968).

Or.—[Tharalson v. State Dept. of Revenue](#), 281 Or. 9, 573 P.2d 298 (1978).

Shares of stock

A state is not precluded by the Fourteenth Amendment from imposing a tax upon the transfer by death of shares of stock in a corporation incorporated in that state, where the securities form part of the estate of a decedent who, at time of his or her death, was a resident of another state and where the securities were kept by the decedent in his or her state of residence.

U.S.—[State Tax Commission of Utah v. Untermeyer](#), 316 U.S. 645, 62 S. Ct. 1104, 86 L. Ed. 1729 (1942).

N.Y.—[In re Fuhrmann's Estate](#), 80 Misc. 2d 751, 363 N.Y.S.2d 883 (Sur. Ct. 1975).

3 U.S.—[Burnet v. Brooks](#), 288 U.S. 378, 53 S. Ct. 457, 77 L. Ed. 844, 86 A.L.R. 747 (1933); [First Nat. Bank v. Commissioner of Internal Revenue](#), 63 F.2d 685 (C.C.A. 1st Cir. 1933).

4 Mont.—[Matter of Ward's Estate](#), 168 Mont. 396, 543 P.2d 382 (1975).

5 U.S.—[State Tax Commission of Utah v. Aldrich](#), 316 U.S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A.L.R. 1436 (1942).

Mass.—[Frost v. Commissioner of Corporations & Taxation](#), 363 Mass. 235, 293 N.E.2d 862 (1973).

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§ 2338. Notice and hearing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4142

An inheritance tax generally is unconstitutional as a deprivation of property without due process if the persons interested are not entitled to notice and an opportunity to be heard as to the valuation of the property on which the amount of the tax depends.

An inheritance tax generally is unconstitutional as a deprivation of property without due process if the persons interested are not entitled to notice and an opportunity to be heard as to the valuation of the property on which the amount of the tax depends.¹ Due process is accorded where there is a provision for the giving of notice and an opportunity to be heard to all persons interested.² A taxpayer asserting nonliability may be afforded constitutional protection by either administrative or judicial review.³

While a notice of assessment is sufficient to the person to whom property is transferred as the representative of the estate, where it does not refer to his or her potential personal liability, a warrant making him or her liable for the estate tax is void for want of the due process requirement of notice.⁴

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Footnotes

1 N.C.—[Kirkpatrick v. Currie](#), 250 N.C. 213, 108 S.E.2d 209 (1959).
Opportunity to test validity
All that is essential in inheritance tax law to constitute due process is that the taxpayer be afforded an opportunity to contest its validity and to show that it is illegal exaction before it is enforced or his or her liability therefor is irrevocably fixed.

2 Va.—[Commonwealth v. Carter](#), 126 Va. 469, 102 S.E. 58 (1920).
Cal.—[Trippet v. State](#), 149 Cal. 521, 86 P. 1084 (1906).
Ga.—[Martin v. Pollock](#), 144 Ga. 605, 87 S.E. 793 (1916).

3 N.C.—[Kirkpatrick v. Currie](#), 250 N.C. 213, 108 S.E.2d 209 (1959).

4 Okla.—[State ex rel. Oklahoma Tax Commission v. Hewett's Estate](#), 1980 OK 192, 621 P.2d 542 (Okla. 1980).

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§ 2339. Customs duties

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4150

Although importers lack a protected property interest in the future importation of goods at a particular tariff rate, a protected property interest is not precluded in the proper assessment of tariffs on goods already imported.

Although importers lack a protected property interest in the future importation of goods at a particular tariff rate, a protected property interest is not precluded in the proper assessment of tariffs on goods already imported.¹

A retroactive amendment imposing countervailing duties does not violate due process where the new law is not wholly new, it resolves uncertainty, it applies retroactively only for a short period, the importer has notice of the change, and it is directed to the remedial administration of trade duties, as opposed to raising government revenue.²

Procedural due process only requires that within the context of a customs' notice to an importer, the surrounding context would alert a reasonable importer to the issue at hand.³ Thus, antidumping orders may only be applied to merchandise that they may be

reasonably interpreted to include.⁴ Also, an importer cannot be penalized where the government provides no evidence suggesting that the duty to disclose pricing information was well known in the trade or that actual customs practice required disclosure.⁵

Merely speculative or unsubstantiated allegations of favoritism by the Department of Commerce in an antidumping review are insufficient to establish a procedural due process violation.⁶

CUMULATIVE SUPPLEMENT

Cases:

Government's import restriction scheme under Cultural Property Implementation Act (CPIA) was not so vague or ambiguous that reasonable person would not know which ancient coins were subject to restrictions, and therefore importer's due process rights were not violated, where importer used relevant lists as guideposts in deciding which ancient coins were likely to be seized by Customs. [U.S. Const. Amend. 5; 19 U.S.C.A. § 2601\(2\); 19 C.F.R. § 12.104\(a\). United States v. Ancient Coin Collectors Guild, 899 F.3d 295 \(4th Cir. 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Nereida Trading Co., Inc. v. U.S.](#), 683 F. Supp. 2d 1348 (Ct. Int'l Trade 2010).

2 U.S.—[GPX Intern. Tire Corp. v. U.S.](#), 780 F.3d 1136 (Fed. Cir. 2015).

3 U.S.—[Western Power Sports, Inc. v. U.S.](#), 32 Ct. Int'l Trade 959, 577 F. Supp. 2d 1314 (2008).

4 U.S.—[Mid Continent Nail Corp. v. U.S.](#), 725 F.3d 1295 (Fed. Cir. 2013).

5 U.S.—[U.S. v. Ford Motor Co.](#), 463 F.3d 1267 (Fed. Cir. 2006).

6 U.S.—[Bridgestone Americas, Inc. v. U.S.](#), 710 F. Supp. 2d 1359 (Ct. Int'l Trade 2010).

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§ 2340. Sales and use taxes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4145

Due process recognizes the power of a state to impose liability on an out-of-state seller to collect a local use tax when the out-of-state seller is plainly accorded the protections and services of the taxing state.

Due process recognizes the power of a state to impose liability on an out-of-state seller to collect a local use tax when the out-of-state seller is plainly accorded the protections and services of the taxing state.¹ When minimum contacts with the state or locality are present, the taxed party receives the benefits and protections of the laws of the state, and there is no due process problem with the state or locality extracting revenue from that party's transactions, but when minimum contacts with that state or locality are lacking, the state or locality offers no services or protections to justify the tax it receives.²

The legislature can constitutionally impose liability for unpaid sales taxes on corporate officers, and a successful due process-based constitutional challenge to such imposition in an individual case requires a showing by clear and convincing evidence that the imposition of liability would be arbitrary and capricious and unreasonable to such a degree as to constitute a violation of constitutional due process.³

A sales tax refund process complies with procedural due process requirements where it provides meaningful backward-looking relief with a clear and certain remedy to rectify the unlawful deprivation.⁴ Thus, a postdeprivation statutory provision that requires a taxpayer to pay the amount in controversy or post a bond for double the amount before seeking judicial review satisfies the Due Process Clause where the possibility of a refund constitutes a clear and certain remedy.⁵

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Footnotes

1 U.S.—[Gordon v. Holder](#), 721 F.3d 638 (D.C. Cir. 2013).
2 U.S.—[Gordon v. Holder](#), 721 F.3d 638 (D.C. Cir. 2013).

Sufficient presence in state

An airline corporation and the corporation's airplane had a sufficient physical presence in the state to establish a substantial nexus with the state, so as to support the airplane use tax's permissibility, even though the airplane was hangared and maintained outside of the state, where, during the relevant two-year period, the airplane made 272 take-offs or landings at state airports, 36.9% of the total flight segments were to or from the state, the airplane was present overnight in the state on 25 occasions, the airplane's purpose was to provide transportation services to a company with an office in the state, and the bill of sale and purchase agreement for the airplane listed a corporate office within the state as the airplane corporation's primary address.

III.—[Irwin Indus. Tool Co. v. Illinois Dept. of Revenue](#), 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).

As to minimum contacts and taxing out-of-state activities, generally, see §§ 2310 to 2313.

3 W. Va.—[Schmehl v. Helton](#), 222 W. Va. 98, 662 S.E.2d 697 (2008).
4 N.D.—[Mann v. North Dakota Tax Com'r](#), 2007 ND 119, 736 N.W.2d 464 (N.D. 2007).
5 Miss.—[Akins v. Mississippi Dept. of Revenue](#), 70 So. 3d 204 (Miss. 2011).

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§ 2341. Taxation of ships and vessels

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4137, 4146

The Due Process Clause is not violated by state taxation of ships and vessels.

The Due Process Clause of the Fourteenth Amendment is not violated by state taxation of ships and vessels sailing the high seas¹ or on inland waters² which are either domiciled in the taxing state³ or which are taxed in proportion to the business in which they engage in the taxing state,⁴ even where their owners have no offices, agents, or employees within the taxing state.⁵

In determining the tax to be paid by a steamship company, the inclusion of tonnage transported in interstate and foreign commerce is a denial of due process.⁶

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Footnotes

1 Alaska—[North Slope Borough v. Puget Sound Tug & Barge](#), 598 P.2d 924 (Alaska 1979).

2 U.S.—[Ott v. Mississippi Val. Barge Line Co.](#), 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

3 U.S.—[Southern Pac. Co. v. Commonwealth of Kentucky](#), 222 U.S. 63, 32 S. Ct. 13, 56 L. Ed. 96 (1911).

4 La.—[Moonmaid Marine, Inc. v. Carpenter](#), 599 So. 2d 820 (La. Ct. App. 1st Cir. 1992), writ denied, [605 So. 2d 1120](#) (La. 1992).

5 U.S.—[Captain Andy's Sailing, Inc. v. Johns](#), 195 F. Supp. 2d 1157 (D. Haw. 2001) (a 2% use fee on the gross receipts of a vessel was not so arbitrary or unreasonable as to bear no rational relationship to the regulation of state facilities, where the fees assessed were used for maintaining, managing, repairing, and improving a harbor which the vessel owner used and/or has access to use).

6 La.—[Williamson Marine Transport, Inc. v. Louisiana Tax Commission](#), 293 So. 2d 29 (La. Ct. App. 1st Cir. 1974), writ denied, [294 So. 2d 839](#) (La. 1974).

5 La.—[Williamson Marine Transport, Inc. v. Louisiana Tax Commission](#), 293 So. 2d 29 (La. Ct. App. 1st Cir. 1974), writ denied, [294 So. 2d 839](#) (La. 1974).

6 Mich.—[Gartland S.S. Corp. v. Michigan Corp. & Securities Commission](#), 339 Mich. 661, 64 N.W.2d 886 (1954).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

N. Taxation, in General

5. Particular Types of Taxes and Other Sources of Revenue

c. Other Types of Taxes and Sources of Income

§ 2342. Taxation of corporate stock shareholders

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4135, 4137

Without denying due process of law, a state may tax all shareholders of domestic corporations on the shares of stock owned by them, but a tax on shares of nonresident shareholders in a foreign corporation doing business in the state contravenes due process.

A state may, without violating the Due Process Clause, tax all shareholders of domestic corporations on the shares of stock owned by them,¹ and this rule applies regardless of whether the shareholders are residents or nonresidents.² However, a state tax on shares of nonresident shareholders in a foreign corporation doing business in the state contravenes the Due Process Clause.³

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Footnotes

1 Ohio—[Ganson v. Heuck](#), 45 Ohio App. 246, 15 Ohio L. Abs. 274, 187 N.E. 27 (1st Dist. Hamilton County 1933).

2 U.S.—[Schuylkill Trust Co. v. Com. of Pennsylvania](#), 302 U.S. 506, 58 S. Ct. 295, 82 L. Ed. 392 (1938);
[Corry v. City of Baltimore](#), 196 U.S. 466, 25 S. Ct. 297, 49 L. Ed. 556 (1905).

3 Ariz.—[Oglesby v. Pacific Finance Corporation of California](#), 44 Ariz. 449, 38 P.2d 646 (1934).
Idaho—[Utah Mortg. Loan Corporation v. Gillis](#), 49 Idaho 676, 290 P. 714 (1930).

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Research References

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West's A.L.R. Digest, [Automobiles](#)  132, 144.1(1), 144.1(1.5), 144.2(9)

West's A.L.R. Digest, [Constitutional Law](#)  4145, 4146, 4262, 4267 to 4297

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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O. Licenses and License Taxes; Sales and Use Taxes

1. Licenses, in General

§ 2343. General standards applicable to licensing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4262

Laws governing the licensing of certain occupations or activities must comply with due process requirements.

Laws governing the licensing of certain occupations or activities must comply with due process requirements,¹ raising questions of compliance with both procedural² and substantive due process,³ as applied in the context of licensing applications and approvals,⁴ the renewal of licenses,⁵ disciplinary proceedings against licensees,⁶ or the suspension or revocation of licenses.⁷

The requirements of procedural due process, as applied in a licensing context, raise questions in two steps: first, whether there exists a liberty or property interest with which the state has interfered; and second, whether the procedures attendant on that deprivation are constitutionally sufficient.⁸ The basic guarantee of procedural due process is that the affected individual must be forewarned and afforded an opportunity to be heard at a meaningful time and in a meaningful manner before a significant deprivation of liberty or property takes place at the state's hands; no rigid taxonomy exists for evaluating the adequacy of state procedures in a given case, but, rather, due process is flexible and calls for such procedural protections as the particular situation

demands.⁹ Procedural due process rights do not apply to laws of general applicability, and thus, the imposition of fees such as licensing fees are not subject to attack on grounds of procedural due process.¹⁰

The substantive due process doctrine functions to protect individuals from particularly offensive actions on the part of government officials in the licensing context, implicating the essence of state action rather than its modalities,¹¹ and it may not be invoked to challenge discretionary permitting or licensing determinations of state or local decision-makers, no matter how unattractive, in the absence of truly horrendous situations that qualify as conscience shocking.¹² A hallmark of successful substantive due process challenges is an extreme lack of proportionality by severe violations of personal rights, disproportionate to the need presented, amounting to an abuse of official power literally shocking to the conscience.¹³

A retroactive licensing scheme not affecting fundamental rights will pass due process scrutiny if the scheme bears a rational relationship to a legitimate state interest.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

A state licensing tribunal violates common law due process when its members have a direct and substantial interest in the outcome of the proceedings. *Wards Corner Beauty Academy v. National Accrediting Commission of Career Arts & Sciences*, 922 F.3d 568 (4th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—*Caesars Massachusetts Management Co., LLC v. Crosby*, 778 F.3d 327 (1st Cir. 2015); *Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009); *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215 (5th Cir. 2012); *Bright v. Gallia County, Ohio*, 753 F.3d 639 (6th Cir. 2014), cert. denied, 135 S. Ct. 1561 (2015).

Mass.—*Kewley v. Department of Elementary and Secondary Educ.*, 86 Mass. App. Ct. 154, 15 N.E.3d 224, 307 Ed. Law Rep. 1065 (2014).

N.Y.—*Joseph Paul Winery Inc. v. State*, 47 Misc. 3d 439, 2 N.Y.S.3d 731 (Sup 2014).

Wash.—*LK Operating, LLC v. Collection Group, LLC*, 181 Wash. 2d 48, 331 P.3d 1147 (2014).

2 U.S.—*Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1 (1st Cir. 2011); *Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009).

N.Y.—*Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 A.D.3d 266, 913 N.Y.S.2d 53 (1st Dep't 2010).

Pa.—*Peachey v. Com., Dept. of Transp.*, Bureau of Driver Licensing, 979 A.2d 951 (Pa. Commw. Ct. 2009).

Wash.—*LK Operating, LLC v. Collection Group, LLC*, 181 Wash. 2d 48, 331 P.3d 1147 (2014).

3 U.S.—*Harron v. Town of Franklin*, 660 F.3d 531 (1st Cir. 2011); *Shanks v. Dressel*, 540 F.3d 1082 (9th Cir. 2008).

Mass.—*Kewley v. Department of Elementary and Secondary Educ.*, 86 Mass. App. Ct. 154, 15 N.E.3d 224, 307 Ed. Law Rep. 1065 (2014).

4 § 2344.

5 § 2345.

6 § 2346.

7 § 2347.

8 U.S.—*Harron v. Town of Franklin*, 660 F.3d 531 (1st Cir. 2011).

9 U.S.—[Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011).

10 N.Y.—[D'Alessandro, ex rel. Vallemajo Properties, LLC v. Kirkmire](#), 125 A.D.3d 1309, 3 N.Y.S.3d 216 (4th Dep't 2015).

11 U.S.—[Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011).

12 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011).

13 **Test for egregious official conduct as abuse of power**
U.S.—[Shanks v. Dressel](#), 540 F.3d 1082 (9th Cir. 2008).

14 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011).

14 U.S.—[Gallo v. U.S. Dist. Court For Dist. of Arizona](#), 349 F.3d 1169 (9th Cir. 2003).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

1. Licenses, in General

§ 2344. Initial application for license

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4262, 4267 to 4297

An initial application for a license or permit does not give rise to a property interest protected under procedural or substantive due process if the licensing authority possesses substantial discretion, but due process requirements apply when property interests are implicated, requiring reasonable standards, guidelines, and criteria, and including either a pre-or-post denial right of review.

An initial application for obtaining a license or permit, subject to the discretion of the licensing authority, is not a protected property interest for purposes of protection under due process requirements,¹ unlike the property interest that may obtain in relation to an existing license subject to renewal,² suspension, revocation,³ or discipline.⁴ No one has a property interest in a mere unilateral expectation, such that due process generally is not required before the denial of a new application for licensure.⁵ Absent a protected property interest, there is no basis for a claim of a procedural due process violation, as by the lack of adequate notice and a meaningful opportunity to be heard,⁶ nor is there a basis for a substantive due process violation, as by egregious arbitrary official action in denying a license.⁷

If the governing law establishes an entitlement that is mandatory in nature, based on compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body, a constitutionally protected property interest is created for purposes of procedural due process.⁸ Likewise, if licensing is so narrowly circumscribed that approval of a proper application is virtually assured, there is a clear entitlement for purposes of a substantive due process property interest.⁹

When protected interests are implicated, the procedural due process right may require some kind of prior hearing,¹⁰ and prior notice,¹¹ but a prelicensing hearing is not necessarily required,¹² provided there is an opportunity to challenge the licensing decision.¹³ Procedural due process does require reasonable standards or guidelines,¹⁴ and objective criteria.¹⁵

When a deprivation of procedural due process is accomplished pursuant to an established state procedure, the State can, and in certain circumstances must, provide a predeprivation remedy.¹⁶ When determining the adequacy of an available state remedy for a procedural due process deprivation, the court must balance (1) the private interest affected by the state action; (2) the risk of an erroneous deprivation through the established state procedures; (3) the probable value of different or additional safeguards; and (4) the government's interest, including the administrative and financial burden or additional procedural safeguards.¹⁷

Rational basis review, rather than a higher degree of scrutiny, is the appropriate standard of review of a substantive due process challenge to a state statute regulating the practice of a profession when the interests at stake are not fundamental.¹⁸

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Footnotes

1 U.S.—*Caesars Massachusetts Management Co., LLC v. Crosby*, 778 F.3d 327 (1st Cir. 2015); *Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009); *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004); *Garlasco v. Stuart*, 602 F. Supp. 2d 396 (D. Conn. 2009).
Mo.—*Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. 2012).
N.Y.—*Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 A.D.3d 266, 913 N.Y.S.2d 53 (1st Dep't 2010).
Discretion militates against property interest
U.S.—*Buonanotte v. Noonan*, 534 F. Supp. 2d 385 (E.D. N.Y. 2008).
No property interest with unfettered discretion
U.S.—*Baumgardner v. Town of Ruston*, 712 F. Supp. 2d 1180 (W.D. Wash. 2010).
Discretion is test, not probable outcome
Mont.—*Seven Up Pete Venture v. State*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009 (2005).
2 § 2345.
3 § 2347.
4 § 2346.
5 Mo.—*Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. 2012).
6 U.S.—*Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009).
Cal.—*Chan v. Judicial Council of California*, 199 Cal. App. 4th 194, 131 Cal. Rptr. 3d 32 (2d Dist. 2011).
7 U.S.—*Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007); *Garlasco v. Stuart*, 602 F. Supp. 2d 396 (D. Conn. 2009).
Cal.—*Chan v. Judicial Council of California*, 199 Cal. App. 4th 194, 131 Cal. Rptr. 3d 32 (2d Dist. 2011).
8 U.S.—*Thornton v. City of St. Helens*, 425 F.3d 1158 (9th Cir. 2005); *Grabhorn, Inc. v. Metropolitan Service Dist.*, 624 F. Supp. 2d 1280 (D. Or. 2009).
Cal.—*Chan v. Judicial Council of California*, 199 Cal. App. 4th 194, 131 Cal. Rptr. 3d 32 (2d Dist. 2011).
9 U.S.—*Garlasco v. Stuart*, 602 F. Supp. 2d 396 (D. Conn. 2009); *Allococo Recycling, Ltd. v. Doherty*, 378 F. Supp. 2d 348 (S.D. N.Y. 2005).
N.Y.—*Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 781 N.Y.S.2d 240, 814 N.E.2d 410 (2004).
10 U.S.—*Garlasco v. Stuart*, 602 F. Supp. 2d 396 (D. Conn. 2009).

Wyo.—[Penny v. State ex rel. Wyoming Mental Health Professions Licensing Bd.](#), 2005 WY 117, 120 P.3d 152 (Wyo. 2005).

11 Wyo.—[Penny v. State ex rel. Wyoming Mental Health Professions Licensing Bd.](#), 2005 WY 117, 120 P.3d 152 (Wyo. 2005).

12 U.S.—[United Pet Supply, Inc. v. City of Chattanooga, Tenn.](#), 768 F.3d 464 (6th Cir. 2014).

N.Y.—[Testwell, Inc. v. New York City Dept. of Bldgs.](#), 80 A.D.3d 266, 913 N.Y.S.2d 53 (1st Dep't 2010).

13 **No limit on discretion**
R.I.—[Mosby v. Devine](#), 851 A.2d 1031 (R.I. 2004).

U.S.—[United Pet Supply, Inc. v. City of Chattanooga, Tenn.](#), 768 F.3d 464 (6th Cir. 2014).

14 **No fair opportunity to challenge**
Ky.—[Phillips v. Com.](#), 324 S.W.3d 741 (Ky. Ct. App. 2010).

Ga.—[Foster v. State](#), 273 Ga. 555, 544 S.E.2d 153 (2001).

15 **Ascertainable standards required**
Kan.—[Hallmark Cards, Inc. v. Kansas Dept. Of Commerce And Housing](#), 32 Kan. App. 2d 715, 88 P.3d 250 (2004).

U.S.—[Baker v. Coxe](#), 230 F.3d 470 (1st Cir. 2000).

Kan.—[Hallmark Cards, Inc. v. Kansas Dept. Of Commerce And Housing](#), 32 Kan. App. 2d 715, 88 P.3d 250 (2004).

16 U.S.—[Buonanotte v. Noonan](#), 534 F. Supp. 2d 385 (E.D. N.Y. 2008).

17 U.S.—[Buonanotte v. Noonan](#), 534 F. Supp. 2d 385 (E.D. N.Y. 2008).

18 U.S.—[American Family Ass'n, Inc. v. F.C.C.](#), 365 F.3d 1156 (D.C. Cir. 2004).

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O. Licenses and License Taxes; Sales and Use Taxes

1. Licenses, in General

§ 2345. Renewal of license

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4262, 4267 to 4297

The law governing the renewal of licenses for certain occupations or activities must comply with procedural and substantive due process requirements, provided the license constitutes a protected property interest.

The deprivation of due process in the context of a license renewal requires a showing that the licensee has a protected property interest in the license.¹ An issued license generally constitutes a protected property interest of the licensee, requiring the licensing authority's compliance with procedural due process, when considering a renewal, extension, or modification of the license.²

No property interest arises if the claim of a benefit is not one of legitimate entitlement³ or statutory entitlement,⁴ or is too ephemeral and insubstantial,⁵ or a mere expectancy.⁶ If government action has not explicitly created a property right in a license or permit, the court looks to the degree to which the government has restrained its own discretion relating to the renewal of the license or permit.⁷ There may be no protected property interest in an issued license if the licensee is on notice under law that the license is subject to termination or restriction as a matter of discretion with the licensing authority,⁸ or if, otherwise, the renewal is a matter of the reviewing body's discretion.⁹

If the governing statute directs that a license must be renewed on compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body, the licensee has property right in the reissuance of a license for purposes of due process.¹⁰ One manner in which state law can create a property interest in the renewal of a license, protected by due process, is by establishing procedural requirements that impose substantive limitations on the exercise of official discretion.¹¹

The essential principle of due process in a license renewal context is that the deprivation of a property interest must be preceded by notice and an opportunity for a hearing that is appropriate to the nature of the case, and the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.¹² The procedural protections afforded a license holder in proceedings for the revocation of the license provide the standard for procedures required to deny a renewal of the license, including a hearing on the nonrenewal,¹³ but due process does not mandate a hearing before the denial of a license renewal¹⁴ if some form of notice and hearing is provided before the denial of a license renewal becomes effective.¹⁵ The lack of a predeprivation hearing in renewal proceedings is a due process violation.¹⁶

The enactment of new license renewal standards affecting the terms for renewal of existing licenses is not a due process violation on that basis alone when the statute affects all licenses since the legislative process provides all the procedural due process to which a licensee is entitled.¹⁷

Substantive due process

A substantive due process challenge to license renewal proceedings or requirements must be predicated on a property interest in the license.¹⁸ The denial of a license renewal is arbitrary and capricious under a substantive due process challenge when it is taken without a sound basis in reason or without regard to the facts.¹⁹ The substantive due process standard of review generally applicable to license renewal laws is review for a rational basis, and not higher or intermediate standards of review, absent the involvement of a fundamental right or liberty interest.²⁰ Licensing regulations on entry into a profession, and the renewal of such licenses, as a general matter, are consistent with due process guarantees if they have a rational connection with the applicant's fitness or capacity to practice the profession.²¹

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Footnotes

- 1 U.S.—[LaBella Winnetka, Inc. v. Village of Winnetka](#), 628 F.3d 937 (7th Cir. 2010); [Jones v. City of Modesto](#), 408 F. Supp. 2d 935 (E.D. Cal. 2005); [Barletta v. Rilling](#), 973 F. Supp. 2d 132 (D. Conn. 2013).
Cal.—[Chan v. Judicial Council of California](#), 199 Cal. App. 4th 194, 131 Cal. Rptr. 3d 32 (2d Dist. 2011).
No interest in expired license
U.S.—[Vars v. Citrin](#), 470 F.3d 413 (1st Cir. 2006).
- 2 U.S.—[Dennis Melancon, Inc. v. City of New Orleans](#), 703 F.3d 262 (5th Cir. 2012), cert. denied, 133 S. Ct. 2396, 185 L. Ed. 2d 1105 (2013); [Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills](#), 589 F.3d 865 (7th Cir. 2009); [Austell v. Sprenger](#), 690 F.3d 929 (8th Cir. 2012).
- 3 U.S.—[Stauch v. City of Columbia Heights](#), 212 F.3d 425 (8th Cir. 2000); [Filler v. United States](#), 116 Fed. Cl. 123 (2014), aff'd, 2015 WL 1015817 (Fed. Cir. 2015).
- 4 U.S.—[Federal Lands Legal Consortium ex rel. Robart Estate v. U.S.](#), 195 F.3d 1190 (10th Cir. 1999).
- 5 U.S.—[Austell v. Sprenger](#), 690 F.3d 929 (8th Cir. 2012).
- 6 U.S.—[Barletta v. Rilling](#), 973 F. Supp. 2d 132 (D. Conn. 2013).
- 7 U.S.—[Federal Lands Legal Consortium ex rel. Robart Estate v. U.S.](#), 195 F.3d 1190 (10th Cir. 1999).
- 8 U.S.—[Caesars Massachusetts Management Co., LLC v. Crosby](#), 778 F.3d 327 (1st Cir. 2015).

9 Cal.—*Chan v. Judicial Council of California*, 199 Cal. App. 4th 194, 131 Cal. Rptr. 3d 32 (2d Dist. 2011).
10 N.Y.—*Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 A.D.3d 266, 913 N.Y.S.2d 53 (1st Dep’t 2010).
11 U.S.—*Thornton v. City of St. Helens*, 425 F.3d 1158 (9th Cir. 2005); *Jones v. City of Modesto*, 408 F. Supp.
12 2d 935 (E.D. Cal. 2005).
13 U.S.—*Thornton v. City of St. Helens*, 425 F.3d 1158 (9th Cir. 2005).
14 U.S.—*Stauch v. City of Columbia Heights*, 212 F.3d 425 (8th Cir. 2000); *Thornton v. City of St. Helens*,
15 425 F.3d 1158 (9th Cir. 2005).
16 U.S.—*Pro’s Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865 (7th Cir. 2009).
17 N.Y.—*M.S.B.A. Corp. v. Markowitz*, 23 A.D.3d 390, 806 N.Y.S.2d 77 (2d Dep’t 2005).
18 U.S.—*Stauch v. City of Columbia Heights*, 212 F.3d 425 (8th Cir. 2000).
19 U.S.—*Pro’s Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865 (7th Cir. 2009).
20 U.S.—*Illusions—Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007).
21 Cal.—*Chan v. Judicial Council of California*, 199 Cal. App. 4th 194, 131 Cal. Rptr. 3d 32 (2d Dist. 2011).
N.Y.—*Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 A.D.3d 266, 913 N.Y.S.2d 53 (1st Dep’t 2010).
Pa.—*Berwick Area Landlord Ass’n v. Borough of Berwick*, 48 A.3d 524 (Pa. Commw. Ct. 2012).
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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

1. Licenses, in General

§ 2346. Discipline of licensee

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4262, 4267 to 4297

The license to practice or engage in a profession, once issued, constitutes a property interest for due process purposes, and a licensee subject to disciplinary proceedings deserves protection under procedural and substantive due process.

The license to practice or engage in a profession, once issued, constitutes a property interest for due process purposes,¹ and a licensee subject to disciplinary proceedings is entitled to the protection of procedural due process,² guaranteeing fundamental fairness.³

Procedural due process requirements for professional disciplinary proceedings do not extend to the full panoply of rights afforded an accused in a criminal case,⁴ but the proceedings may be considered quasi-criminal in nature⁵ and must include an opportunity to be heard⁶ and present a case⁷ or respond to charges⁸ in a fair and impartial hearing,⁹ without comingling distinct investigatory, prosecutorial, and adjudicative functions.¹⁰ Notice must be adequate¹¹ and timely.¹² The licensee is entitled to a judgment made without bias or interest on the part of a hearing officer.¹³

A predeprivation hearing is not necessarily required, when the balance of private and public interests favors immediate action, as when the licensee poses a risk to public safety, but a prompt postdeprivation hearing is required.¹⁴

The length of disciplinary proceedings, from initial notice to disposition, is not in itself a due process violation,¹⁵ particularly not by the application of criminal speedy trial criteria which are inapplicable.¹⁶ Even the violation of prescribed time limits for disciplinary hearings is not a procedural due process violation in the absence of prejudice.¹⁷

Disciplinary provisions must provide explicit standards for enforcement and will violate due process when they are unconstitutionally vague, as in according unfettered discretion to the enforcement authorities and by lacking any objective standard for application.¹⁸ The provisions must give persons of ordinary intelligence the reasonable opportunity to know what is prohibited.¹⁹

Substantive due process.

The licensee is entitled to substantive due process in disciplinary proceedings, precluding official action that shocks the conscience.²⁰ Under substantive due process, a professional's right to practice with limited government control does not implicate a fundamental right, and thus, a rational relationship test rather than the strict scrutiny standard applies in determining whether a statutory discipline provision is a violation of due process.²¹ The requirements of license disciplinary provisions must be rationally related to the state's legitimate legislative purpose.²²

CUMULATIVE SUPPLEMENT

Cases:

Attorney in reciprocal discipline proceedings was not denied due process in underlying disciplinary proceedings in Washington based on Washington Supreme Court's denial of his motion to file an over-length brief. *U.S. Const. Amend. 14. In re Sanai*, 360 Or. 497, 383 P.3d 821 (2016).

[END OF SUPPLEMENT]

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Footnotes

¹ U.S.—*Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1 (1st Cir. 2011); *Pharmacy Buying Ass'n, Inc. v. Sebelius*, 906 F. Supp. 2d 604 (W.D. Tex. 2012).

Cal.—*Hansen v. Board of Registered Nursing*, 208 Cal. App. 4th 664, 145 Cal. Rptr. 3d 739 (4th Dist. 2012).

Conn.—*Smigelski v. Dubois*, 153 Conn. App. 186, 100 A.3d 954 (2014).

Mo.—*Garozzo v. Missouri Dept. of Ins., Financial Institutions & Professional Registration, Div. of Finance*, 389 S.W.3d 660 (Mo. 2013).

Wash.—*In re Disciplinary Proceeding Against Petersen*, 180 Wash. 2d 768, 329 P.3d 853 (2014).

² U.S.—*Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1 (1st Cir. 2011); *In re Peters*, 642 F.3d 381 (2d Cir. 2011); *Adams v. Ford Motor Co.*, 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011); *Crum v. Vincent*, 493 F.3d 988 (8th Cir. 2007); *In re Lehtinen*, 564 F.3d 1052 (9th Cir. 2009); *In re Harper*, 725 F.3d 1253 (10th Cir. 2013).

Ariz.—*In re Aubuchon*, 233 Ariz. 62, 309 P.3d 886 (2013), as amended, (Oct. 25, 2013) and cert. denied, 134 S. Ct. 1309, 188 L. Ed. 2d 360 (2014).

Conn.—*Smigelski v. Dubois*, 153 Conn. App. 186, 100 A.3d 954 (2014).

Minn.—[Staeheli v. City of St. Paul](#), 732 N.W.2d 298 (Minn. Ct. App. 2007).

Tenn.—[Hyman v. Board of Professional Responsibility of Supreme Court](#), 437 S.W.3d 435 (Tenn. 2014).

W. Va.—[Lawyer Disciplinary Bd. v. Scotchel](#), 234 W. Va. 627, 768 S.E.2d 730 (2014).

Strict adherence to prescribed rules

Ark.—[Flynn v. Board of Certified Court Reporter Examiners](#), 372 Ark. 520, 279 S.W.3d 75 (2008).

No ideal set of procedures required

U.S.—[In re Barach](#), 540 F.3d 82 (1st Cir. 2008).

Not encumbered by technical rules and formal requirements

Minn.—[In re Disciplinary Action against Michael](#), 836 N.W.2d 753 (Minn. 2013).

3 U.S.—[In re Barach](#), 540 F.3d 82 (1st Cir. 2008).

Conn.—[Smigelski v. Dubois](#), 153 Conn. App. 186, 100 A.3d 954 (2014).

N.D.—[In re Disciplinary Action Against Overboe](#), 2014 ND 62, 844 N.W.2d 851 (N.D. 2014).

Utah—[Johnson v. Office of Professional Conduct](#), 2014 UT 57, 342 P.3d 280 (Utah 2014).

4 U.S.—[In re Harper](#), 725 F.3d 1253 (10th Cir. 2013).

Colo.—[Matter of Olsen](#), 2014 CO 42, 326 P.3d 1004 (Colo. 2014).

Iowa—[Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath](#), 713 N.W.2d 682 (Iowa 2006).

Mo.—[Schumer v. Lee](#), 404 S.W.3d 443 (Mo. Ct. App. W.D. 2013).

Tenn.—[Hyman v. Board of Professional Responsibility of Supreme Court](#), 437 S.W.3d 435 (Tenn. 2014).

Not a criminal proceeding

U.S.—[In re Lehtinen](#), 564 F.3d 1052 (9th Cir. 2009).

5 U.S.—[In re Peters](#), 642 F.3d 381 (2d Cir. 2011); [Sealed Appellant 1 v. Sealed Appellee 1](#), 211 F.3d 252 (5th Cir. 2000).

Ariz.—[In re Aubuchon](#), 233 Ariz. 62, 309 P.3d 886 (2013), as amended, (Oct. 25, 2013) and cert. denied, 134 S. Ct. 1309, 188 L. Ed. 2d 360 (2014).

Conn.—[Smigelski v. Dubois](#), 153 Conn. App. 186, 100 A.3d 954 (2014).

Neither civil nor criminal

Minn.—[In re Disciplinary Action against Michael](#), 836 N.W.2d 753 (Minn. 2013).

6 U.S.—[Ryan v. Astra Tech, Inc.](#), 772 F.3d 50 (1st Cir. 2014); [Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011); [Adams v. Ford Motor Co.](#), 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011); [In re Lehtinen](#), 564 F.3d 1052 (9th Cir. 2009); [In re Harper](#), 725 F.3d 1253 (10th Cir. 2013).

Fla.—[The Florida Bar v. Townsend](#), 145 So. 3d 775 (Fla. 2014).

Utah—[Johnson v. Office of Professional Conduct](#), 2014 UT 57, 342 P.3d 280 (Utah 2014).

Confronting and examining witnesses

U.S.—[In re Peters](#), 642 F.3d 381 (2d Cir. 2011); [In re Zdravkovich](#), 634 F.3d 574 (D.C. Cir. 2011).

No confrontation right

U.S.—[In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

7 U.S.—[In re Harper](#), 725 F.3d 1253 (10th Cir. 2013).

Minn.—[In re Disciplinary Action against Michael](#), 836 N.W.2d 753 (Minn. 2013).

8 U.S.—[In re Peters](#), 642 F.3d 381 (2d Cir. 2011).

Fla.—[The Florida Bar v. Townsend](#), 145 So. 3d 775 (Fla. 2014).

No discipline for uncharged conduct

Ill.—[In re Karavidas](#), 2013 IL 115767, 376 Ill. Dec. 413, 999 N.E.2d 296 (Ill. 2013).

9 U.S.—[Friedman v. Rogers](#), 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979); [In re Harper](#), 725 F.3d 1253 (10th Cir. 2013); [In re Zdravkovich](#), 634 F.3d 574 (D.C. Cir. 2011).

Conn.—[Smigelski v. Dubois](#), 153 Conn. App. 186, 100 A.3d 954 (2014).

Wash.—[In re Disciplinary Proceeding against Starczewski](#), 177 Wash. 2d 771, 306 P.3d 905 (2013).

Meaningful hearing

U.S.—[Crum v. Vincent](#), 493 F.3d 988 (8th Cir. 2007).

Utah—[Johnson v. Office of Professional Conduct](#), 2014 UT 57, 342 P.3d 280 (Utah 2014).

Disciplinary rules require evidentiary hearing

U.S.—[Adams v. Ford Motor Co.](#), 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011).

10 Pa.—[Khan v. State Bd. of Auctioneer Examiners](#), 577 Pa. 166, 842 A.2d 936 (2004).

R.I.—[In re McKenna](#), 110 A.3d 1126 (R.I. 2015).

11 U.S.—[Ryan v. Astra Tech, Inc.](#), 772 F.3d 50 (1st Cir. 2014); [Adams v. Ford Motor Co.](#), 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011); [In re Lehtinen](#), 564 F.3d 1052 (9th Cir. 2009); [In re Zdravkovich](#), 634 F.3d 574 (D.C. Cir. 2011).
Conn.—[Smigelski v. Dubois](#), 153 Conn. App. 186, 100 A.3d 954 (2014).
Minn.—[In re Disciplinary Action against Michael](#), 836 N.W.2d 753 (Minn. 2013).
N.Y.—[In re Sondel](#), 111 A.D.3d 168, 974 N.Y.S.2d 15 (1st Dep't 2013).
Tenn.—[Hyman v. Board of Professional Responsibility of Supreme Court](#), 437 S.W.3d 435 (Tenn. 2014).
Failure to follow notice rule
Ark.—[Flynn v. Board of Certified Court Reporter Examiners](#), 372 Ark. 520, 279 S.W.3d 75 (2008).
Notice by mail is adequate
U.S.—[Crum v. Vincent](#), 493 F.3d 988 (8th Cir. 2007).
Show cause order as notice
U.S.—[Federal Grievance Committee v. Williams](#), 743 F.3d 28 (2d Cir. 2014), as amended on other grounds, (Apr. 10, 2014) and cert. denied, 135 S. Ct. 1423 (2015); [In re Grodner](#), 587 Fed. Appx. 166 (5th Cir. 2014).
12 U.S.—[Adams v. Ford Motor Co.](#), 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011).
Minn.—[Staeheli v. City of St. Paul](#), 732 N.W.2d 298 (Minn. Ct. App. 2007).
13 U.S.—[In re Harper](#), 725 F.3d 1253 (10th Cir. 2013).
R.I.—[In re McKenna](#), 110 A.3d 1126 (R.I. 2015).
Wash.—[In re Disciplinary Proceeding Against Jackson](#), 180 Wash. 2d 201, 322 P.3d 795 (2014).
No right to select hearing panel
Tenn.—[Hyman v. Board of Professional Responsibility of Supreme Court](#), 437 S.W.3d 435 (Tenn. 2014).
No violation in appointment procedure
U.S.—[In re Zdravkovich](#), 634 F.3d 574 (D.C. Cir. 2011).
14 U.S.—[Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011).
15 U.S.—[In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).
Six-year delay not violation
N.D.—[In re Disciplinary Action Against Overboe](#), 2014 ND 62, 844 N.W.2d 851 (N.D. 2014).
16 U.S.—[In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).
Minn.—[Staeheli v. City of St. Paul](#), 732 N.W.2d 298 (Minn. Ct. App. 2007).
17 U.S.—[Hayes v. New York Attorney Grievance Committee of the Eight Judicial Dist.](#), 672 F.3d 158 (2d Cir. 2012).
Conduct proscriptions and exceptions not vague
Nev.—[In re Discipline of Lerner](#), 124 Nev. 1232, 197 P.3d 1067 (2008).
18 U.S.—[Hayes v. New York Attorney Grievance Committee of the Eight Judicial Dist.](#), 672 F.3d 158 (2d Cir. 2012).
Ky.—[Curd v. Kentucky State Bd. of Licensure for Professional Engineers and Land Surveyors](#), 433 S.W.3d 291 (Ky. 2014).
Pa.—[Shapiro v. State Bd. of Accountancy](#), 856 A.2d 864 (Pa. Commw. Ct. 2004).
20 U.S.—[Marler v. Missouri State Bd. of Optometry](#), 102 F.3d 1453 (8th Cir. 1996).
Iowa—[Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath](#), 713 N.W.2d 682 (Iowa 2006).
N.J.—[O'Boyle v. District I Ethics Committee](#), 421 N.J. Super. 457, 24 A.3d 809 (App. Div. 2011).
21 Pa.—[Khan v. State Bd. of Auctioneer Examiners](#), 577 Pa. 166, 842 A.2d 936 (2004).
22 U.S.—[Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011); [Gadda v. State Bar of Cal.](#), 511 F.3d 933 (9th Cir. 2007).
Rational basis test applies
N.J.—[O'Boyle v. District I Ethics Committee](#), 421 N.J. Super. 457, 24 A.3d 809 (App. Div. 2011).

16D C.J.S. Constitutional Law § 2347

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

1. Licenses, in General

§ 2347. Suspension or revocation of license

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4262, 4267 to 4297

Actions by licensing authorities to suspend or revoke the license of a person with a protected property interest in the license must comply with substantive and procedural due process requirements.

Official action aimed at deprivation of a person's license by suspension or revocation is subject to procedural due process requirements if the licensee has a property interest in the license.¹ In considering whether the procedural due process provided is adequate for a license suspension or revocation, the court considers: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²

Procedural due process in the suspension or revocation of a license in which the licensee holds a protected property interest does not require the full panoply of due process rights afforded to an accused in a criminal case³ but does require notice⁴ and an opportunity to be heard⁵ at a meaningful time.⁶

A predeprivation hearing is generally required,⁷ but the failure to provide a predeprivation hearing does not per se violate procedural due process,⁸ particularly when the licensing authority must act quickly or when a predeprivation hearing is impracticable.⁹ Never providing an opportunity to challenge a permit revocation, either predeprivation or postdeprivation, violates procedural due process.¹⁰

A license suspension or revocation proceeding must be fair¹¹ and conducted before an unbiased hearing officer or panel,¹² but due process is not violated merely because investigative and adjudicative functions are merged.¹³

An extended delay in the proceedings is not, in itself, a violation, in the absence of a showing of harm thereby to the licensee, and the right to a speedy trial in criminal proceedings has no application to license suspension or revocation proceedings,¹⁴ but holding a postdeprivation hearing years after a license suspension is not adequate due process when livelihoods are at stake.¹⁵

Provisions governing the suspension or revocation of a license must not be unconstitutionally vague within the requirements of the Due Process Clause, meaning that the law must define its requirements and proscriptions with sufficient definiteness that ordinary people can understand what conduct is prohibited and must establish standards to permit enforcement in a manner that is not arbitrary or discriminatory.¹⁶

Substantive due process.

The arbitrary deprivation of a property right by the suspension or revocation of a license can constitute a violation of substantive due process,¹⁷ but a claim of an actionable substantive due process violation in the revocation or suspension of a license requires showing that the official action is taken with a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.¹⁸ The rational basis test applies in determining the validity of license suspension or revocation laws challenged as denying substantive due process, requiring a substantial relationship to public health, safety, or welfare.¹⁹ A substantive due process claim in a license suspension or revocation proceeding is subject to waiver, if not timely raised.²⁰

Reinstatement.

A person whose license has been suspended or revoked is entitled to due process when seeking reinstatement of the license, requiring notice and an opportunity to be heard.²¹ Because of the nature of the due process property interest in a business license, a licensee erroneously deprived of a license cannot be made whole simply by reinstating the license.²²

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Footnotes

- 1 U.S.—*Belue v. Leventhal*, 640 F.3d 567 (4th Cir. 2011); *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215 (5th Cir. 2012); *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464 (6th Cir. 2014); *Austell v. Sprenger*, 690 F.3d 929 (8th Cir. 2012); *Guttmann v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012).
Conn.—*Statewide Grievance Committee v. Johnson*, 108 Conn. App. 74, 946 A.2d 1256 (2008).
La.—*Davis v. State Bd. of Certified Public Accountants of Louisiana*, 131 So. 3d 391 (La. Ct. App. 4th Cir. 2013).
Pa.—*Heller v. Com., Dept. of Transp., Bureau of Motor Vehicles*, 26 A.3d 538 (Pa. Commw. Ct. 2011).
Misconduct requirement establishes protected interest
U.S.—*Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009).

2 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009); [Bowlby v. City of Aberdeen, Miss.](#), 681 F.3d 215 (5th Cir. 2012).

3 U.S.—[Committee on the Conduct of Attorneys v. Oliver](#), 510 F.3d 1219 (10th Cir. 2007).

4 U.S.—[Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011); [Federal Grievance Committee v. Williams](#), 743 F.3d 28 (2d Cir. 2014), as amended on other grounds, (Apr. 10, 2014) and cert. denied, 135 S. Ct. 1423 (2015); [In re Harper](#), 725 F.3d 1253 (10th Cir. 2013).

5 Ark.—[Flynn v. Board of Certified Court Reporter Examiners](#), 372 Ark. 520, 279 S.W.3d 75 (2008).

6 Minn.—[In re Disciplinary Action against Hawkins](#), 834 N.W.2d 663 (Minn. 2013).

7 **Specification of charged conduct required**

8 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009).

9 **Notice of charges and evidence**

10 N.Y.—[McAvoy v. Klein](#), 117 A.D.3d 1058, 986 N.Y.S.2d 511 (2d Dep't 2014).

11 **Show cause order sufficient notice**

12 U.S.—[Ryan v. Astra Tech, Inc.](#), 772 F.3d 50 (1st Cir. 2014).

13 U.S.—[Ryan v. Astra Tech, Inc.](#), 772 F.3d 50 (1st Cir. 2014); [Bowlby v. City of Aberdeen, Miss.](#), 681 F.3d 215 (5th Cir. 2012); [In re Harper](#), 725 F.3d 1253 (10th Cir. 2013); [Taylor v. Huerta](#), 723 F.3d 210 (D.C. Cir. 2013).

14 Ala.—[Ex parte Case](#), 925 So. 2d 956 (Ala. 2005).

15 Minn.—[In re Disciplinary Action against Hawkins](#), 834 N.W.2d 663 (Minn. 2013).

16 Okla.—[State ex rel. Oklahoma Bar Ass'n v. Mothershed](#), 2011 OK 84, 264 P.3d 1197 (Okla. 2011), as corrected on other grounds, (Oct. 18, 2011).

17 **Flexible protections geared to situation**

18 U.S.—[Guttman v. Khalsa](#), 669 F.3d 1101 (10th Cir. 2012).

19 Conn.—[Statewide Grievance Committee v. Johnson](#), 108 Conn. App. 74, 946 A.2d 1256 (2008).

20 **Due process denied**

21 Due process is denied in the course of a license revocation hearing when the licensee is not allowed to respond to the charges and the court fails to specify the basis for its action or to conduct an individualized inquiry.

22 U.S.—[Belue v. Leventhal](#), 640 F.3d 567 (4th Cir. 2011).

23 U.S.—[Bowlby v. City of Aberdeen, Miss.](#), 681 F.3d 215 (5th Cir. 2012).

24 U.S.—[Guillemard-Ginorio v. Contreras-Gomez](#), 490 F.3d 31 (1st Cir. 2007); [Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009).

25 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009); [Bowlby v. City of Aberdeen, Miss.](#), 681 F.3d 215 (5th Cir. 2012); [United Pet Supply, Inc. v. City of Chattanooga, Tenn.](#), 768 F.3d 464 (6th Cir. 2014).

26 **Temporary suspension without hearing**

27 U.S.—[Coward v. Gilroy](#), 306 Fed. Appx. 647 (2d Cir. 2009).

28 N.H.—[In re Reiner's Case](#), 152 N.H. 163, 872 A.2d 1038 (2005).

29 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009); [Bowlby v. City of Aberdeen, Miss.](#), 681 F.3d 215 (5th Cir. 2012); [Camuglia v. The City of Albuquerque](#), 448 F.3d 1214 (10th Cir. 2006).

30 **Imminent danger to public safety**

31 U.S.—[Guttman v. Khalsa](#), 669 F.3d 1101 (10th Cir. 2012).

32 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009); [United Pet Supply, Inc. v. City of Chattanooga, Tenn.](#), 768 F.3d 464 (6th Cir. 2014).

33 Ark.—[Chandler v. Martin ex rel. State](#), 2014 Ark. 219, 433 S.W.3d 884 (2014).

34 Okla.—[State ex rel. Oklahoma Bar Ass'n v. Mothershed](#), 2011 OK 84, 264 P.3d 1197 (Okla. 2011), as corrected on other grounds, (Oct. 18, 2011).

35 **Postdeprivation hearing is adequate**

36 U.S.—[Guttman v. Khalsa](#), 669 F.3d 1101 (10th Cir. 2012).

37 **Boycott of hearing erodes claim**

38 U.S.—[Gonzalez-Droz v. Gonzalez-Colon](#), 660 F.3d 1 (1st Cir. 2011).

39 **Cure by subsequent right of appeal**

40 U.S.—[Coward v. Gilroy](#), 306 Fed. Appx. 647 (2d Cir. 2009).

41 Minn.—[In re Disciplinary Action against Hawkins](#), 834 N.W.2d 663 (Minn. 2013).

42 N.Y.—[San Miguel Auto Repair Corp. v. State Dept. of Motor Vehicles](#), 111 A.D.3d 422, 974 N.Y.S.2d 386 (1st Dep't 2013).

12 N.Y.—[San Miguel Auto Repair Corp. v. State Dept. of Motor Vehicles](#), 111 A.D.3d 422, 974 N.Y.S.2d 386 (1st Dep’t 2013).

Bias not shown

Idaho—[Williams v. Idaho State Bd. of Real Estate Appraisers](#), 157 Idaho 496, 337 P.3d 655 (2014).

13 U.S.—[In re Marcone](#), 395 Fed. Appx. 807 (3d Cir. 2010).

14 U.S.—[In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

15 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009).

16 U.S.—[Hegwood v. City of Eau Claire](#), 676 F.3d 600 (7th Cir. 2012).

17 U.S.—[Camuglia v. The City of Albuquerque](#), 448 F.3d 1214 (10th Cir. 2006).

Requires nexus with proscribed acts

Wash.—[Ritter v. State, Bd. of Registration for Professional Engineers and Land Surveyors](#), 161 Wash. App. 758, 255 P.3d 799 (Div. 2 2011).

18 U.S.—[Camuglia v. The City of Albuquerque](#), 448 F.3d 1214 (10th Cir. 2006); [Valdez v. New Mexico](#), 109 Fed. Appx. 257 (10th Cir. 2004).

19 U.S.—[Frey Corp. v. City of Peoria, Ill.](#), 735 F.3d 505 (7th Cir. 2013).

20 U.S.—[Committee on the Conduct of Attorneys v. Oliver](#), 510 F.3d 1219 (10th Cir. 2007).

21 U.S.—[Harris v. Mills](#), 572 F.3d 66 (2d Cir. 2009).

Fundamental fairness required

Colo.—[In re Price](#), 18 P.3d 185 (Colo. 2001).

22 U.S.—[Spinelli v. City of New York](#), 579 F.3d 160 (2d Cir. 2009).

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16D C.J.S. Constitutional Law § 2348

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

a. Licensing Sales of Intoxicating Liquors

§ 2348. General standards applicable to licensing sales of intoxicating liquors

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4289

A statute regulating the sale of alcoholic beverages ordinarily must be reasonably related to a legitimate governmental interest, in order to comply with due process of law, and due process safeguards are applicable to procedures employed by the authorities in processing an application for a liquor license.

State laws regulating the sale of alcoholic beverages or intoxicating liquor must comply with the requirements of substantive due process of law, requiring a rational basis and a reasonable relationship to a legitimate governmental interest, not involving suspect classifications or implicating fundamental rights.¹ Substantive due process prohibits the application or enforcement of liquor licensing laws in a manner evincing deliberate indifference to fundamental rights or a purpose to do harm, both to the extent that the official conduct shocks the conscience.² Generally, a permit or license denial, no matter how unattractive, is unlikely to qualify as conscience-shocking, as required for a violation of substantive due process, if the official action falls short of being truly horrendous.³

Liquor licensing provisions are subject to due process challenges for impermissible vagueness, requiring, for purposes of a facial vagueness challenge, a law that is impermissibly vague in all applications, and, for purposes of "as applied" vagueness, that the law is impermissibly vague as applied to the particular case before the court.⁴ For this purpose, a liquor licensing law is unconstitutionally vague if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and fails to establish standards to permit enforcement in a manner that is not arbitrary or discriminatory.⁵

When the licensing authority grants a liquor license, the licensee may hold a property interest in the license within the protection of procedural due process,⁶ although the law of some states is to contrary, recognizing a liquor license as a privilege only or finding no property interest in a liquor license for constitutional purposes.⁷ There is no protected property interest or liberty interest in a liquor license prior to the issuance of the license, and a mere prospective licensee has no procedural due process rights in the license.⁸

The status of a liquor license as a property interest is particularly applicable as the basis for requiring due process in proceedings to suspend or revoke a liquor license⁹ but also applies as the basis for requiring due process in the ongoing application or enforcement of liquor licensing laws.¹⁰

Procedural due process requires fairness in liquor licensing procedures¹¹ by the application of due process safeguards to procedures for liquor license applications,¹² as well as to liquor license renewals,¹³ liquor license transfers,¹⁴ and modifications or amendments of liquor licenses.¹⁵ Due process does not prohibit the liquor licensing authority from mixing investigatory, prosecutorial, and adjudicative functions as necessary to administration, absent a showing of prejudice or bias.¹⁶

The enactment of a generally applicable liquor licensing statute, affecting the basis of initial applications and renewals, does not deny due process to license holders, since the legislative process provides all the due process to which a licensee is entitled, even when the enactment extinguishes a property interest affecting a general class of people.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Liquor license applicant did not have legitimate claim of entitlement to permanent liquor licenses, and thus county liquor board's denial of his applications did not violate his procedural due process rights, even though he held temporary liquor licenses, board's chairman had stated that his applications would be approved, and board purportedly had history of leniently granting applications, where county code did not require board to grant temporary license holder's application for permanent license, and county manager corrected chairman's statements and clarified that applications would only be considered, not necessarily approved. [U.S. Const. Amend. 14, § 1; Nev. Const. art. 1, § 8. Malfitano v. County of Storey By and Through Storey County Board of County Commissioners, 396 P.3d 815 \(Nev. 2017\).](#)

[END OF SUPPLEMENT]

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Footnotes

¹ U.S.—[Frey Corp. v. City of Peoria, Ill., 735 F.3d 505 \(7th Cir. 2013\); Decatur Liquors, Inc. v. District of Columbia, 478 F.3d 360 \(D.C. Cir. 2007\).](#)
Mich.—[Florentine Ristorante, Inc. v. City of Grandville, 88 Mich. App. 614, 278 N.W.2d 694 \(1979\).](#)

2 U.S.—[Weston v. Harrigan](#), 359 Fed. Appx. 868 (9th Cir. 2009).

3 **No violation found**

4 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011); [Decatur Liquors, Inc. v. District of Columbia](#), 478 F.3d 360 (D.C. Cir. 2007).

5 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011); [Royal Oak Entertainment, LLC v. City of Royal Oak, Michigan](#), 205 Fed. Appx. 389, 2006 FED App. 0824N (6th Cir. 2006).

6 **Stemming public drunkenness not misconduct**

7 U.S.—[Decatur Liquors, Inc. v. District of Columbia](#), 478 F.3d 360 (D.C. Cir. 2007).

8 U.S.—[Hegwood v. City of Eau Claire](#), 676 F.3d 600 (7th Cir. 2012).

9 U.S.—[Hegwood v. City of Eau Claire](#), 676 F.3d 600 (7th Cir. 2012).

10 **Reasonable notice required**

11 U.N.Y.—[Joseph Paul Winery Inc. v. State](#), 47 Misc. 3d 439, 2 N.Y.S.3d 731 (Sup 2014).

12 **Restrictive ordinance not vague**

13 Tex.—[Pak-a-Sak, Inc. v. City of Perryton](#), 451 S.W.3d 133 (Tex. App. Amarillo 2014).

14 U.S.—[R.S.W.W., Inc. v. City of Keego Harbor](#), 397 F.3d 427, 2005 FED App. 0065P (6th Cir. 2005); [Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills](#), 589 F.3d 865 (7th Cir. 2009).

15 Colo.—[Morris-Schindler, LLC v. City and County of Denver](#), 251 P.3d 1076 (Colo. App. 2010).

16 Ill.—[Wisam 1, Inc. v. Illinois Liquor Control Com'n](#), 2014 IL 116173, 385 Ill. Dec. 1, 18 N.E.3d 1 (Ill. 2014), cert. denied, 135 S. Ct. 1494 (2015).

17 **Property interest assumed on issuance**

18 U.S.—[Illusions—Dallas Private Club, Inc. v. Steen](#), 482 F.3d 299 (5th Cir. 2007); [Flowers v. Wray](#), 511 Fed. Appx. 576 (7th Cir. 2013).

19 **Site approval not license or property interest**

20 U.S.—[Frey Corp. v. City of Peoria, Ill.](#), 735 F.3d 505 (7th Cir. 2013).

21 U.S.—[Lexra, Inc. v. City of Deerfield Beach, Fla.](#), 593 Fed. Appx. 860 (11th Cir. 2014) (applying Florida law).

22 Md.—[O'Brien v. Board of License Com'rs for Washington County](#), 199 Md. App. 563, 23 A.3d 323 (2011).

23 N.Y.—[Joseph Paul Winery Inc. v. State](#), 47 Misc. 3d 439, 2 N.Y.S.3d 731 (Sup 2014).

24 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011); [Maxwell's Pic-Pac, Inc. v. Dehner](#), 739 F.3d 936 (6th Cir. 2014) (applying Kentucky law); [Frey Corp. v. City of Peoria, Ill.](#), 735 F.3d 505 (7th Cir. 2013).

25 **No property interest in waiting list priority**

26 Idaho—[Fuchs v. State, Dept. of Idaho State Police, Bureau of Alcohol Beverage Control](#), 152 Idaho 626, 272 P.3d 1257 (2012).

27 **Potential purchaser without interest**

28 U.S.—[Royal Oak Entertainment, LLC v. City of Royal Oak, Michigan](#), 205 Fed. Appx. 389, 2006 FED App. 0824N (6th Cir. 2006).

29 **§ 2349.**

30 U.S.—[Weston v. Harrigan](#), 359 Fed. Appx. 868 (9th Cir. 2009).

31 Cal.—[Nick v. City of Lake Forest](#), 232 Cal. App. 4th 871, 181 Cal. Rptr. 3d 530 (4th Dist. 2014), review denied, (Mar. 11, 2015).

32 Ill.—[Wisam 1, Inc. v. Illinois Liquor Control Com'n](#), 2014 IL 116173, 385 Ill. Dec. 1, 18 N.E.3d 1 (Ill. 2014), cert. denied, 135 S. Ct. 1494 (2015).

33 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011).

34 Cal.—[Nick v. City of Lake Forest](#), 232 Cal. App. 4th 871, 181 Cal. Rptr. 3d 530 (4th Dist. 2014), review denied, (Mar. 11, 2015).

35 Ill.—[Wisam 1, Inc. v. Illinois Liquor Control Com'n](#), 2014 IL 116173, 385 Ill. Dec. 1, 18 N.E.3d 1 (Ill. 2014), cert. denied, 135 S. Ct. 1494 (2015).

36 U.S.—[LaBella Winnetka, Inc. v. Village of Winnetka](#), 628 F.3d 937 (7th Cir. 2010); [Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills](#), 589 F.3d 865 (7th Cir. 2009).

37 Alaska—[Rollins v. State, Dept. of Public Safety](#), 312 P.3d 1091 (Alaska 2013).

38 Pa.—[Paey Associates, Inc. v. Pennsylvania Liquor Control Bd.](#), 78 A.3d 1187 (Pa. Commw. Ct. 2013) appeal denied, 87 A.3d 817 (Pa. 2014).

39 **No protected interest after expiration**

40 U.S.—[Vars v. Citrin](#), 470 F.3d 413 (1st Cir. 2006).

No protected interest in renewal

Colo.—[Morris-Schindler, LLC v. City and County of Denver](#), 251 P.3d 1076 (Colo. App. 2010).

Md.—[O'Brien v. Board of License Com'rs for Washington County](#), 199 Md. App. 563, 23 A.3d 323 (2011).

14 U.S.—[Harron v. Town of Franklin](#), 660 F.3d 531 (1st Cir. 2011).

No vested right to transfer

Md.—[O'Brien v. Board of License Com'rs for Washington County](#), 199 Md. App. 563, 23 A.3d 323 (2011).

15 U.S.—[Flowers v. Wray](#), 511 Fed. Appx. 576 (7th Cir. 2013).

16 D.C.—[Alemayehu v. District of Columbia Alcoholic Beverage Control Bd.](#), 109 A.3d 1095 (D.C. 2014).

17 U.S.—[Illusions—Dallas Private Club, Inc. v. Steen](#), 482 F.3d 299 (5th Cir. 2007).

Individual due process not required

U.S.—[Decatur Liquors, Inc. v. District of Columbia](#), 478 F.3d 360 (D.C. Cir. 2007).

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16D C.J.S. Constitutional Law § 2349

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

a. Licensing Sales of Intoxicating Liquors

§ 2349. Suspension or revocation of license to sell intoxicating liquors

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4289

A liquor licensee, possessing a property interest in an existing license, is entitled to substantive and procedural due process protection when official action is brought to suspend or revoke the license.

A liquor licensee, possessing a property interest in an existing license to sell alcoholic beverages or intoxicating liquors,¹ is entitled to substantive² and procedural due process protection when official action is brought to revoke or suspend the license.³ Procedural due process requires notice to the liquor licensee⁴ and an opportunity to be heard.⁵ The availability of postdeprivation proceedings is generally sufficient even in the absence of prior notice and a hearing.⁶

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Footnotes

¹ [§ 2348.](#)

2 U.S.—[Frey Corp. v. City of Peoria, Ill.](#), 735 F.3d 505 (7th Cir. 2013).
No protected property interest
U.S.—[Artistic Entertainment, Inc. v. City of Warner Robins](#), 134 Fed. Appx. 306 (11th Cir. 2005).
3 U.S.—[Ruttenberg v. Jones](#), 283 Fed. Appx. 121 (4th Cir. 2008); [Frey Corp. v. City of Peoria, Ill.](#), 735 F.3d 505 (7th Cir. 2013); [Foxy Lady, Inc. v. City of Atlanta, Ga.](#), 347 F.3d 1232 (11th Cir. 2003).
Cal.—[Rondon v. Alcoholic Beverage Control Appeals Bd.](#), 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295 (6th Dist. 2007), as modified on other grounds, (June 11, 2007).
Ill.—[Boom Town Saloon, Inc. v. City of Chicago](#), 384 Ill. App. 3d 27, 323 Ill. Dec. 120, 892 N.E.2d 1112 (1st Dist. 2008).
Ky.—[Pizza Pub of Burnside v. Com., Dept. of ABC](#), 416 S.W.3d 780 (Ky. Ct. App. 2013).
Va.—[Norfolk 102, LLC v. City of Norfolk](#), 285 Va. 340, 738 S.E.2d 895 (2013).
Statute not vague
U.S.—[Hegwood v. City of Eau Claire](#), 676 F.3d 600 (7th Cir. 2012).
Ordinance not overly broad
Ga.—[Folsom v. City of Jasper](#), 279 Ga. 260, 612 S.E.2d 287 (2005).
Failure to state claim of cancellation
U.S.—[LaBella Winnetka, Inc. v. Village of Winnetka](#), 628 F.3d 937 (7th Cir. 2010).
A.L.R. Library
Right to hearing before revocation or suspension of liquor license, 35 A.L.R.2d 1067.
4 Minn.—[In re On-Sale Liquor License, Class B.](#), 763 N.W.2d 359 (Minn. Ct. App. 2009).
Neb.—[JCB Enterprises, Inc. v. Nebraska Liquor Control Com'n](#), 275 Neb. 797, 749 N.W.2d 873 (2008).
Va.—[Norfolk 102, LLC v. City of Norfolk](#), 285 Va. 340, 738 S.E.2d 895 (2013).
Violation when no notice provided
N.Y.—[Joseph Paul Winery Inc. v. State](#), 47 Misc. 3d 439, 2 N.Y.S.3d 731 (Sup 2014).
5 U.S.—[Frey Corp. v. City of Peoria, Ill.](#), 735 F.3d 505 (7th Cir. 2013); [Trihn v. Moghaddam](#), 369 Fed. Appx. 865 (9th Cir. 2010).
Va.—[Norfolk 102, LLC v. City of Norfolk](#), 285 Va. 340, 738 S.E.2d 895 (2013).
Tailored to capacities and circumstances
U.S.—[Foxy Lady, Inc. v. City of Atlanta, Ga.](#), 347 F.3d 1232 (11th Cir. 2003).
Participation wrongly denied
Ky.—[Pizza Pub of Burnside v. Com., Dept. of ABC](#), 416 S.W.3d 780 (Ky. Ct. App. 2013).
6 U.S.—[Artistic Entertainment, Inc. v. City of Warner Robins](#), 134 Fed. Appx. 306 (11th Cir. 2005); [Foxy Lady, Inc. v. City of Atlanta, Ga.](#), 347 F.3d 1232 (11th Cir. 2003).
Failure to avail of postdeprivation remedies
U.S.—[LaBella Winnetka, Inc. v. Village of Winnetka](#), 628 F.3d 937 (7th Cir. 2010).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

b. Licensing Motor Vehicles and Operators

§ 2350. General standards applicable to licensing of motor vehicles and operators

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4352 to 4358

Due process requirements apply to state procedures with respect to the licensing of motor vehicles and motor vehicle operators.

Due process requirements apply to state procedures for the licensing of motor vehicles¹ and the licensing of motor vehicle operators,² including licensing for operator-learner's permits³ and commercial operators' licenses.⁴

A challenge on substantive due process grounds requires a showing that the licensing requirement is not rationally based in relation to the state's interest in the licensing scheme, establishing that the government's action is arbitrary and capricious.⁵ A person's property interest in a driver's license, while important, is not a fundamental right for purposes of a substantive due process challenge, allowing review under the rational basis test instead of heightened review.⁶ The state's legitimate interest in not having offensive scatological language on "vanity" license plates suffices to support the restriction of certain language on plates without infringing due process, given the citizen's minimal opposing interests.⁷

Due process protections for motor vehicle operators' licensing generally apply whether the license is considered a purely personal privilege⁸ or a property interest.⁹ Certain state laws, however, expressly deny a protected property interest in vehicle license plates, retaining ownership of the plate in the state without regard to the vehicle owner's mandatory payment of a registration fee to obtain the plate.¹⁰ Procedural due process protections do not apply to motor vehicle licensing requirements when the licensing provision does not create a protected property interest as may be the case in the application of special commercial permitting schemes.¹¹

A licensing statute violated due process by creating an irrebuttable presumption against the issuance of a driver's license to a person with an underlying medical condition, not allowing the individual the opportunity to present medical evidence in an effort to establish competency to drive.¹²

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Footnotes

1 U.S.—[LaCroix v. Marshall County, Mississippi](#), 409 Fed. Appx. 794 (5th Cir. 2011); [Taylor v. District of Columbia](#), 606 F. Supp. 2d 93 (D.D.C. 2009); [Laudermilk v. Fordice](#), 948 F. Supp. 596 (N.D. Miss. 1996). Ill.—[Larkin v. Hartigan](#), 250 Ill. App. 3d 969, 189 Ill. Dec. 630, 620 N.E.2d 598 (4th Dist. 1993). **Required registration display not violation**
U.S.—[U.S. v. Dexter](#), 165 F.3d 1120 (7th Cir. 1999).

2 U.S.—[Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); [Dixon v. Love](#), 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); [Bell v. Burson](#), 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); [Taylor v. District of Columbia](#), 606 F. Supp. 2d 93 (D.D.C. 2009). Ill.—[People v. Miklos](#), 393 Ill. App. 3d 205, 333 Ill. Dec. 87, 914 N.E.2d 506 (3d Dist. 2009). Mass.—[Gordon v. Registry of Motor Vehicles](#), 75 Mass. App. Ct. 47, 912 N.E.2d 9 (2009). N.J.—[Loring v. Clark](#), 2010 WL 4178855 (N.J. Super. Ct. App. Div. 2010). Okla.—[Pierce v. State ex rel. Dept. of Public Safety](#), 2014 OK 37, 327 P.3d 530 (Okla. 2014). S.C.—[Hipp v. South Carolina Dept. of Motor Vehicles](#), 381 S.C. 323, 673 S.E.2d 416 (2009). Wash.—[Amunrud v. Board of Appeals](#), 158 Wash. 2d 208, 143 P.3d 571, 30 A.L.R.6th 775 (2006). W. Va.—[Harrison v. Commissioner, Div. of Motor Vehicles](#), 226 W. Va. 23, 697 S.E.2d 59 (2010). R.I.—[Berberian v. Petit](#), 118 R.I. 448, 374 A.2d 791, 86 A.L.R.3d 468 (1977). **Valid requirement for school attendance**
W. Va.—[Means v. Sidiropolis](#), 184 W. Va. 514, 401 S.E.2d 447, 65 Ed. Law Rep. 1309 (1990).

4 U.S.—[Dixon v. Love](#), 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977). Wash.—[Amunrud v. Board of Appeals](#), 158 Wash. 2d 208, 143 P.3d 571, 30 A.L.R.6th 775 (2006). Wash.—[Amunrud v. Board of Appeals](#), 158 Wash. 2d 208, 143 P.3d 571, 30 A.L.R.6th 775 (2006). **Ignition interlock rationally related to public safety**
Mass.—[Gordon v. Registry of Motor Vehicles](#), 75 Mass. App. Ct. 47, 912 N.E.2d 9 (2009). **Rational basis for health impairment reporting**
U.S.—[Behar v. Pennsylvania Dept. of Transp.](#), 791 F. Supp. 2d 383 (M.D. Pa. 2011), appeal dismissed, (3d Cir. 13-1571) (May 23, 2013). **Rational basis for weight, width, and use schedules**
U.S.—[Reid Machinery Inc. v. Lanzer](#), 421 Fed. Appx. 497 (6th Cir. 2010). N.C.—[Bald Head Island, Ltd. v. Village of Bald Head Island](#), 175 N.C. App. 543, 624 S.E.2d 406 (2006). Ill.—[Horvath v. White](#), 358 Ill. App. 3d 844, 295 Ill. Dec. 215, 832 N.E.2d 366 (1st Dist. 2005). U.S.—[Perry v. McDonald](#), 280 F.3d 159 (2d Cir. 2001). Fla.—[Bradsheer v. Florida Dept. of Highway Safety and Motor Vehicles](#), 20 So. 3d 915 (Fla. 1st DCA 2009). Ohio—[Doyle v. Ohio Bureau of Motor Vehicles](#), 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990). Wis.—[Kopf v. State Through Dept. of Transp.](#), 158 Wis. 2d 208, 461 N.W.2d 813 (Ct. App. 1990). U.S.—[Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); [Dixon v. Love](#), 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); [Bell v. Burson](#), 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

90 (1971); *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001); *Plumer v. State of Md.*, 915 F.2d 927 (4th Cir. 1990); *LaCroix v. Marshall County, Mississippi*, 409 Fed. Appx. 794 (5th Cir. 2011); *Laudermilk v. Fordice*, 948 F. Supp. 596 (N.D. Miss. 1996).

Fla.—*Bradsheer v. Florida Dept. of Highway Safety and Motor Vehicles*, 20 So. 3d 915 (Fla. 1st DCA 2009).

Ill.—*People v. Miklos*, 393 Ill. App. 3d 205, 333 Ill. Dec. 87, 914 N.E.2d 506 (3d Dist. 2009).

Okla.—*Pierce v. State ex rel. Dept. of Public Safety*, 2014 OK 37, 327 P.3d 530 (Okla. 2014).

Wash.—*Amunrud v. Board of Appeals*, 158 Wash. 2d 208, 143 P.3d 571, 30 A.L.R.6th 775 (2006).

W. Va.—*Harrison v. Commissioner, Div. of Motor Vehicles*, 226 W. Va. 23, 697 S.E.2d 59 (2010).

10 U.S.—*Tuttle v. Land*, 2010 WL 2232210 (E.D. Mich. 2010) (applying Michigan law).

11 U.S.—*Reid Machinery, Inc. v. Lanzer*, 614 F. Supp. 2d 849 (N.D. Ohio 2009), aff'd, 421 Fed. Appx. 497 (6th Cir. 2010).

12 Pa.—*Golovach v. Com., Dept. of Transp., Bureau of Driver Licensing*, 4 A.3d 759 (Pa. Commw. Ct. 2010).

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XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

b. Licensing Motor Vehicles and Operators

§ 2351. Financial and safety responsibility laws

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4358

Due process requirements apply to state financial and safety responsibility laws, including those mandating insurance coverage, with respect to the licensing of motor vehicles and motor vehicle operators.

Due process requirements are applicable to state safety responsibility statutes which require compliance on penalty of barring the issuance of a license,¹ or which provide for deprivation of a license,² or the impoundment of a licensed vehicle.³ The applicable rules governing procedures under such provisions must protect the individual's due process right to the opportunity for a hearing to contest the pertinent issues before the deprivation.⁴ The level of procedural due process protections required, however, is not commensurate with criminal proceedings since the nature of a safety law compliance action is administrative and remedial; in this context, due process does not require a postdeprivation remedy by compliance, given the state's interest in heightening awareness of insurance requirements and deterring future noncompliance.⁵

A compulsory vehicle insurance requirement does not violate substantive due process by charging duplicate fees to certain vehicle owners procuring private insurance in order to guarantee coverage, provided the authority implements a meaningful notice and refund process that complies with procedural due process.⁶

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Footnotes

1 U.S.—[Bell v. Burson](#), 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

2 U.S.—[Jennings v. Mahoney](#), 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971).

No facial due process violation

Neb.—[Shirley v. Neth](#), 264 Neb. 138, 646 N.W.2d 587 (2002).

Must allow proof on issue of knowledge

U.S.—[Lee v. State of R.I.](#), 942 F. Supp. 750 (D.R.I. 1996).

Hardship exception provided due process

Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

3 La.—[Fields v. State Through Dept. of Public Safety and Corrections](#), 714 So. 2d 1244 (La. 1998).

4 Ill.—[Guerrero v. Ryan](#), 272 Ill. App. 3d 945, 209 Ill. Dec. 408, 651 N.E.2d 586 (1st Dist. 1995).

5 Alaska—[Titus v. State, Dept. of Admin., Div. of Motor Vehicles](#), 305 P.3d 1271 (Alaska 2013).

6 U.S.—[Garcia-Rubiera v. Fortuno](#), 665 F.3d 261 (1st Cir. 2011).

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16D C.J.S. Constitutional Law § 2352

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

b. Licensing Motor Vehicles and Operators

§ 2352. Suspension or revocation of motor vehicle operator's license

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Automobiles](#) 132

West's Key Number Digest, [Constitutional Law](#) 4356

State laws and procedures for the suspension, revocation, or other deprivation of a motor vehicle operator's license must comply with substantive and procedural due process.

State laws and procedures for the suspension, revocation, or other deprivation of a motor vehicle operator's license must comply with substantive¹ and procedural due process.²

For due process purposes, in the context of a suspension, revocation, or other deprivation of a driver's license, an issued motor vehicle operator's license is generally regarded as an important protectable interest of the licensee³ although driving is generally considered a privilege⁴ and not a fundamental right.⁵

Procedural due process standards for the suspension or revocation of a driver's license are generally flexible,⁶ requiring a forum for the determination of the question⁷ and a meaningful hearing appropriate to the nature of the case⁸ before a fair and impartial tribunal.⁹

A summary disposition is permissible when founded on an immediately preceding conviction of specified offenses,¹⁰ as may include a reciprocal disposition based on proceedings in another state,¹¹ or as based on objective statutory criteria involving public safety,¹² but may not rest on an irrebuttable presumption against licensing, precluding an opportunity to present evidence on competency to drive.¹³

The state may take ex parte action in depriving a motorist of a driver's license, within the constraints of due process,¹⁴ provided a subsequent hearing is available.¹⁵

Procedural due process generally requires that a licensee must be afforded notice¹⁶ and an opportunity to be heard before the deprivation.¹⁷ Procedural due process rights include the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver.¹⁸

When postdeprivation proceedings by judicial review will occur only after the deprivation, adequate due process is not provided unless the effectiveness of the deprivation is stayed pending the judicial hearing.¹⁹ A statutory right of judicial review of a license revocation is itself a protected property interest that cannot be denied on the ground that the licensee subsequently procured a restricted license.²⁰

A postdeprivation hearing is not required when the deprivation is predicated on determinations in prior proceedings in which due process is afforded and there are no contested facts for resolution in another hearing.²¹

CUMULATIVE SUPPLEMENT

Cases:

Suspension of attorney's driver's license, under California statutory scheme establishing public list of top 500 delinquent state taxpayers who owed in excess of \$100,000, and providing for suspension of driver's license of a taxpayer on the delinquent list, did not impermissibly burden attorney's chosen profession in violation of his Fourteenth Amendment substantive due process rights; revocation of his driver's license did not operate as a complete prohibition on his ability to practice law, in that he still had access to public transit. [U.S. Const. Amend. 14; Cal. Bus. & Prof. Code § 494.5; Cal. Rev. & Tax. Code § 19195. Franceschi v. Yee, 887 F.3d 927 \(9th Cir. 2018\).](#)

Statutory sections, prohibiting reinstatement of driving privileges if driver refused to submit to chemical test for intoxication upon a second or subsequent arrest before payment of fee, and mandating installation of ignition interlock device in vehicle as condition for reinstatement of driver's license when a person refused to submit to chemical test for a second arrest, were within State's police power and, thus, not violative of substantive due process; provisions were rationally related to health, safety, morals and general welfare of State citizens, and implied-consent law gave legislature rational basis for penalizing arrestee's refusal to consent to chemical test by either charging an enhanced administrative fee for reinstatement or withholding reinstatement altogether. [U.S. Const. Amend. 14; La. Rev. Stat. Ann. § 32:667\(H\)\(3\), \(I\)\(1\)\(a\). Carver v. Louisiana Department of Public Safety, 239 So. 3d 226 \(La. 2018\).](#)

A driver's license suspension which is unreasonably delayed through no fault of the driver can potentially result in a denial of due process; where the suspension is delayed for an extraordinary period of time, the staleness of the predicate conviction tends to diminish the connection between the suspension and the statute's objectives, particularly where there have been no Vehicle Code violations in the interim. [U.S. Const. Amend. 14; 75 Pa. Cons. Stat. Ann. § 3804\(e\)\(1\). Department of Transportation, Bureau of Driver Licensing v. Middaugh](#), 244 A.3d 426 (Pa. 2021).

Revocation of motorist's driver's license by the Commissioner of the Division of Motor Vehicles (DMV) approximately two years after his arrest for driving under the influence of alcohol (DUI) did not prejudice motorist, and thus the delay was not a procedural due-process violation, even though the delay was excessive and unreasonable, the resulting misdemeanor DUI charge was dismissed, and the statute of limitations for misdemeanors was one year; there was a clear statutory demarcation between the administrative issue on a suspension and the criminal issue on a DUI charge, and motorist presented no evidence at the hearing in defense of the DMV's assertion that he was driving under the influence. [U.S. Const. Amend. 14; W. Va. Const. art. 3, §§ 10, 17; W. Va. Code Ann. § 61-11-9. Straub v. Reed](#), 806 S.E.2d 768 (W. Va. 2017).

[END OF SUPPLEMENT]

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Footnotes

1 Mass.—[Gordon v. Registry of Motor Vehicles](#), 75 Mass. App. Ct. 47, 912 N.E.2d 9 (2009).
N.Y.—[Brown v. New York State Dept. of Motor Vehicles](#), 44 Misc. 3d 182, 988 N.Y.S.2d 428 (Sup 2014).
Not vague
Ind.—[Lock v. State](#), 971 N.E.2d 71 (Ind. 2012).
Not arbitrary
Idaho—[Peck v. State, Dept. of Transp.](#), 153 Idaho 37, 278 P.3d 439 (Ct. App. 2012).
Not capricious
Ind.—[Leone v. Commissioner, Indiana Bureau of Motor Vehicles](#), 933 N.E.2d 1244 (Ind. 2010).
Rationally related to proper legislative purpose
Wash.—[Nielsen v. Washington State Dept. of Licensing](#), 177 Wash. App. 45, 309 P.3d 1221 (Div. 1 2013).
U.S.—[Burlison v. Rogers](#), 311 Fed. Appx. 207 (11th Cir. 2008).
Fla.—[Department of Highway Safety and Motor Vehicles v. Futch](#), 142 So. 3d 910 (Fla. 5th DCA 2014).
Ga.—[Chancellor v. Dozier](#), 283 Ga. 259, 658 S.E.2d 592 (2008).
Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).
Minn.—[Williams v. Commissioner of Public Safety](#), 830 N.W.2d 442 (Minn. Ct. App. 2013).
Neb.—[Murray v. Neth](#), 279 Neb. 947, 783 N.W.2d 424 (2010).
N.D.—[Whitecalfe v. North Dakota Dept. of Transp.](#), 2007 ND 32, 727 N.W.2d 779 (N.D. 2007).
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Validity, construction, application, and effect of statute requiring conditions, in addition to expiration of time, for reinstatement of suspended or revoked driver's license, 2 A.L.R.5th 725 (§§ 3(a), 3(b), Due process).
Sufficiency of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 A.L.R.3d 427.
Necessity of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 A.L.R.3d 361.
U.S.—[Perry v. McDonald](#), 280 F.3d 159 (2d Cir. 2001); [Pascarella v. Swift Transp. Co., Inc.](#), 643 F. Supp. 2d 639 (D.N.J. 2009).
Ga.—[Chancellor v. Dozier](#), 283 Ga. 259, 658 S.E.2d 592 (2008).
Idaho—[In re Beyer](#), 155 Idaho 40, 304 P.3d 1206 (Ct. App. 2013).
Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).
Minn.—[Williams v. Commissioner of Public Safety](#), 830 N.W.2d 442 (Minn. Ct. App. 2013).
N.D.—[Whitecalfe v. North Dakota Dept. of Transp.](#), 2007 ND 32, 727 N.W.2d 779 (N.D. 2007).
4 Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

Mont.—[Nichols v. Department of Justice, Driver's License Bureau](#), 2011 MT 33, 359 Mont. 251, 248 P.3d 813 (2011).

Tex.—[Phillips v. Texas Dept. of Public Safety](#), 362 S.W.3d 252 (Tex. App. Beaumont 2012).

Conditional privilege

Va.—[Com. v. Shaffer](#), 263 Va. 428, 559 S.E.2d 623 (2002).

5 Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

Mass.—[Gordon v. Registry of Motor Vehicles](#), 75 Mass. App. Ct. 47, 912 N.E.2d 9 (2009).

Wyo.—[State, Dept. of Transp. v. Robbins](#), 2011 WY 23, 246 P.3d 864 (Wyo. 2011).

Driving is not a right

Mont.—[Nichols v. Department of Justice, Driver's License Bureau](#), 2011 MT 33, 359 Mont. 251, 248 P.3d 813 (2011).

6 Minn.—[Williams v. Commissioner of Public Safety](#), 830 N.W.2d 442 (Minn. Ct. App. 2013).

Pa.—[Phillips v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 80 A.3d 561 (Pa. Commw. Ct. 2013), appeal denied, 91 A.3d 163 (Pa. 2014).

Wyo.—[State, Dept. of Transp. v. Robbins](#), 2011 WY 23, 246 P.3d 864 (Wyo. 2011).

7 Neb.—[Murray v. Neth](#), 279 Neb. 947, 783 N.W.2d 424 (2010).

Administrative proceeding

Fla.—[Department of Highway Safety and Motor Vehicles v. Futch](#), 142 So. 3d 910 (Fla. 5th DCA 2014).

Kan.—[DeLong v. Kansas Dept. of Revenue](#), 45 Kan. App. 2d 454, 252 P.3d 582 (2011).

N.D.—[Whitecalfe v. North Dakota Dept. of Transp.](#), 2007 ND 32, 727 N.W.2d 779 (N.D. 2007).

Tex.—[Phillips v. Texas Dept. of Public Safety](#), 362 S.W.3d 252 (Tex. App. Beaumont 2012).

8 Cal.—[Petrus v. State Dept. of Motor Vehicles](#), 194 Cal. App. 4th 1240, 123 Cal. Rptr. 3d 686 (4th Dist. 2011).

Ga.—[Chancellor v. Dozier](#), 283 Ga. 259, 658 S.E.2d 592 (2008).

Kan.—[DeLong v. Kansas Dept. of Revenue](#), 45 Kan. App. 2d 454, 252 P.3d 582 (2011).

Neb.—[Murray v. Neth](#), 279 Neb. 947, 783 N.W.2d 424 (2010).

Wash.—[Martin v. State Dept. of Licensing](#), 175 Wash. App. 9, 306 P.3d 969 (Div. 2 2013).

Pre-hearing filing fee permitted

Wash.—[Didlake v. Washington State](#), 345 P.3d 43 (Wash. Ct. App. Div. 1 2015).

9 Kan.—[DeLong v. Kansas Dept. of Revenue](#), 45 Kan. App. 2d 454, 252 P.3d 582 (2011).

Commingling of functions acceptable

N.D.—[Dittus v. North Dakota Dept. of Transp.](#), 502 N.W.2d 100 (N.D. 1993).

10 Pa.—[Kozieniak v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 100 A.3d 326 (Pa. Commw. Ct. 2014).

Pa.—[Phillips v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 80 A.3d 561 (Pa. Commw. Ct. 2013), appeal denied, 91 A.3d 163 (Pa. 2014).

11 U.S.—[Burlison v. Rogers](#), 311 Fed. Appx. 207 (11th Cir. 2008).

Mo.—[Jarvis v. Director of Revenue](#), 804 S.W.2d 22 (Mo. 1991).

12 Pa.—[Golovach v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 4 A.3d 759 (Pa. Commw. Ct. 2010).

13 U.S.—[Dixon v. Love](#), 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); [Fox v. Van Oosterum](#), 176 F.3d 342, 1999 FED App. 0164P (6th Cir. 1999).

Idaho—[Bell v. Idaho Transp. Dept.](#), 151 Idaho 659, 262 P.3d 1030 (Ct. App. 2011).

14 Mo.—[Strup v. Director of Revenue](#), 311 S.W.3d 793 (Mo. 2010).

Failure to request predeprivation hearing

U.S.—[Pascarella v. Swift Transp. Co., Inc.](#), 643 F. Supp. 2d 639 (D.N.J. 2009).

15 U.S.—[Fox v. Van Oosterum](#), 176 F.3d 342, 1999 FED App. 0164P (6th Cir. 1999); [Burlison v. Rogers](#), 311 Fed. Appx. 207 (11th Cir. 2008).

Idaho—[Bell v. Idaho Transp. Dept.](#), 151 Idaho 659, 262 P.3d 1030 (Ct. App. 2011).

Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

Mo.—[Strup v. Director of Revenue](#), 311 S.W.3d 793 (Mo. 2010).

Delay must be prejudicial

Kan.—[Turner v. Kansas Dept. of Revenue](#), 46 Kan. App. 2d 841, 264 P.3d 1050 (2011).

W. Va.—[Miller v. Moredock](#), 229 W. Va. 66, 726 S.E.2d 34 (2011).

16 U.S.—[Perry v. McDonald](#), 280 F.3d 159 (2d Cir. 2001); [Burlison v. Rogers](#), 311 Fed. Appx. 207 (11th Cir. 2008); [Taylor v. District of Columbia](#), 606 F. Supp. 2d 93 (D.D.C. 2009).

Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

Notice sufficient to prepare defense

Pa.—[Phillips v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 80 A.3d 561 (Pa. Commw. Ct. 2013), appeal denied, 91 A.3d 163 (Pa. 2014).

Actual notice not required

Mo.—[Session v. Director of Revenue](#), 417 S.W.3d 898 (Mo. Ct. App. W.D. 2014).

Statutory notice is sufficient

U.S.—[Pascarella v. Swift Transp. Co., Inc.](#), 643 F. Supp. 2d 639 (D.N.J. 2009).

17 U.S.—[Illinois v. Batchelder](#), 463 U.S. 1112, 103 S. Ct. 3513, 77 L. Ed. 2d 1267 (1983); [Perry v. McDonald](#), 280 F.3d 159 (2d Cir. 2001); [Burlison v. Rogers](#), 311 Fed. Appx. 207 (11th Cir. 2008).

Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

Pa.—[Kozieniak v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 100 A.3d 326 (Pa. Commw. Ct. 2014).

Provision for judicial review

Mo.—[Session v. Director of Revenue](#), 417 S.W.3d 898 (Mo. Ct. App. W.D. 2014).

18 Fla.—[Department of Highway Safety and Motor Vehicles v. Futch](#), 142 So. 3d 910 (Fla. 5th DCA 2014).

Right to confront and examine witnesses

Mo.—[Tweedy v. Director of Revenue](#), 412 S.W.3d 389 (Mo. Ct. App. E.D. 2013).

Wash.—[Martin v. State Dept. of Licensing](#), 175 Wash. App. 9, 306 P.3d 969 (Div. 2 2013).

Right to cross-examine

Tex.—[Phillips v. Texas Dept. of Public Safety](#), 362 S.W.3d 252 (Tex. App. Beaumont 2012).

Ind.—[Indiana Bureau of Motor Vehicles v. Gurtner](#), 27 N.E.3d 306 (Ind. Ct. App. 2015).

19 Wash.—[Nielsen v. Washington State Dept. of Licensing](#), 177 Wash. App. 45, 309 P.3d 1221 (Div. 1 2013).

20 D.C.—[Wall v. Babers](#), 82 A.3d 794 (D.C. 2014).

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16D C.J.S. Constitutional Law § 2353

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

b. Licensing Motor Vehicles and Operators

§ 2353. Suspension or revocation of motor vehicle operator's license—Driving under influence of alcohol or drug

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Automobiles](#)  132, 144.1(1), 144.1(1.5), 144.2(9)

West's Key Number Digest, [Constitutional Law](#)  4356, 4358

A licensed motor vehicle operator must be accorded due process when the authorities seek to suspend or revoke the driver's license for driving while under the influence of alcohol or drugs.

State laws and procedures for the suspension, revocation, or other deprivation of a motor vehicle operator's license for driving while under the influence of alcohol or drugs must comply with substantive¹ and procedural due process,² given the general recognition of a driver's license as a protected interest for purposes of deprivation within the confines of due process.³

In this context, procedural due process requires notice and a hearing to suspend or revoke a driver's license,⁴ meaning reasonable notice and a fair hearing,⁵ but summary disposition is permissible on arrest,⁶ and a hearing need not be afforded prior to the deprivation action,⁷ provided a subsequent hearing is afforded.⁸

Due process standards applicable in a criminal context are not applicable to license suspension or revocation proceedings that are remedial in nature and not punitive,⁹ and the standard of proof need not reach the standard of proof beyond a reasonable doubt; a preponderance of the evidence will suffice.¹⁰ Due process generally entails the right to confront and examine witnesses and compel the attendance of witnesses.¹¹

A mandatory suspension or revocation predicated on a criminal conviction is proper without a separate pre-or-post-deprivation hearing when the driver has the opportunity to address the issue in the criminal proceedings.¹² An administrative hearing officer's prior determination that a driver failed a valid blood alcohol concentration test may constitute issue preclusion, barring further consideration of the question for purposes of a subsequent review hearing within the standards of due process.¹³

If the state drops the predicate alcohol charges underlying a license suspension, due process requires that the suspended driver have an opportunity to challenge the lawfulness of the traffic stop which led to a failed alcohol breath test and the license suspension.¹⁴

Due process does not require the administration of both an alcohol Breathalyzer test and a physical coordination test by an arresting officer as a predicate for a driving while intoxicated charge and license suspension, as applied to non-English speakers, absent evidence of a discriminatory animus when the choice of options is rationally related to the state's legitimate purpose.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Motorist failed to demonstrate that he suffered actual and substantial prejudice as would violate his due process rights as a result of post-hearing delay of more than two years in issuance of decision by Office of Administrative Hearings (OAH) affirming decision of Division of Motor Vehicles (DMV) revoking his driver's license due to arrest for driving while under the influence of alcohol; he did not allege any type of detrimental change in his circumstances related to the delay by OAH in issuing its final order, other than that he failed to make contingency plans for his employment as a truck driver in reliance on the notion that his license revocation would not be affirmed. [W. Va. Const. art. 3, § 17](#); [W. Va. Code Ann. §§ 17C-5C-1, 17C-5C-5](#). *Reed v. Boley*, 813 S.E.2d 754 (W. Va. 2018).

Office of Administrative Hearings' (OAH) 11-month delay after administrative hearing in issuing its final order upholding the decision of the Commissioner of the Division of Motor Vehicles (DMV) to revoke motorist's driver's license, which was a decision made approximately two years after motorist's arrest for driving under the influence of alcohol (DUI), did not prejudice motorist, and thus the delay was not a procedural due-process violation, even though OAH's delay was egregious, absent some type of detrimental change in motorist's circumstances. [U.S. Const. Amend. 14](#); [W. Va. Const. art. 3, §§ 10, 17](#). *Straub v. Reed*, 806 S.E.2d 768 (W. Va. 2017).

[END OF SUPPLEMENT]

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Footnotes

¹ Kan.—[Katz v. Kansas Dept. of Revenue](#), 45 Kan. App. 2d 877, 256 P.3d 876 (2011).
Rational basis review is standard

N.Y.—[People v. Salazar](#), 112 A.D.3d 5, 973 N.Y.S.2d 140 (1st Dep't 2013), leave to appeal denied, 22 N.Y.3d 1090, 981 N.Y.S.2d 676, 4 N.E.3d 978 (2014).

Rationally related to the legitimate state purpose

Idaho—[Peck v. State, Dept. of Transp.](#), 156 Idaho 112, 320 P.3d 1271 (Ct. App. 2014).

Not arbitrary or capricious

N.Y.—[Allen v. New York State Dept. of Motor Vehicles](#), 45 Misc. 3d 475, 991 N.Y.S.2d 701 (Sup 2014).

Not overbroad

Pa.—[Com. v. Finchio](#), 592 Pa. 577, 926 A.2d 968 (2007).

Not vague

Mo.—[Korte v. Director of Revenue](#), 352 S.W.3d 610 (Mo. Ct. App. S.D. 2011).

Utah—[State v. Manwaring](#), 2011 UT App 443, 268 P.3d 201 (Utah Ct. App. 2011).

Substantial state interests

Neb.—[Penry v. Neth](#), 20 Neb. App. 276, 823 N.W.2d 243 (2012).

2

Idaho—[Platz v. State](#), 154 Idaho 960, 303 P.3d 647 (Ct. App. 2013).

Ill.—[People v. Morales](#), 2015 IL App (1st) 131207, 388 Ill. Dec. 687, 24 N.E.3d 1260 (App. Ct. 1st Dist. 2015).

Kan.—[Martin v. Kansas Dept. of Revenue](#), 285 Kan. 625, 176 P.3d 938 (2008).

Neb.—[Penry v. Neth](#), 20 Neb. App. 276, 823 N.W.2d 243 (2012).

Pa.—[Kozieniak v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 100 A.3d 326 (Pa. Commw. Ct. 2014).

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3

Idaho—[Peck v. State, Dept. of Transp.](#), 156 Idaho 112, 320 P.3d 1271 (Ct. App. 2014).

4

Ill.—[People v. Morales](#), 2015 IL App (1st) 131207, 388 Ill. Dec. 687, 24 N.E.3d 1260 (App. Ct. 1st Dist. 2015).

Pa.—[Kozieniak v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 100 A.3d 326 (Pa. Commw. Ct. 2014).

Delay in hearing not violation

Alaska—[Alvarez v. State, Dept. of Admin., Div. of Motor Vehicles](#), 249 P.3d 286 (Alaska 2011).

W. Va.—[Holland v. Miller](#), 230 W. Va. 35, 736 S.E.2d 35 (2012).

5

Wyo.—[Dubbelde v. State, ex rel., Dept. of Transp.](#), 2014 WY 63, 324 P.3d 820 (Wyo. 2014), as revised, (June 17, 2014).

Statutory notice is sufficient

Idaho—[Peck v. State, Dept. of Transp.](#), 156 Idaho 112, 320 P.3d 1271 (Ct. App. 2014).

Telephonic oath and testimony permitted

Alaska—[Alvarez v. State, Dept. of Admin., Div. of Motor Vehicles](#), 249 P.3d 286 (Alaska 2011).

Neb.—[Penry v. Neth](#), 20 Neb. App. 276, 823 N.W.2d 243 (2012).

Impartial hearing

Idaho—[Elias-Cruz v. Idaho Dept. of Transp.](#), 153 Idaho 200, 280 P.3d 703 (2012).

Sham administrative hearing not sufficient

Kan.—[Manzano v. Kansas Dept. of Revenue](#), 50 Kan. App. 2d 263, 324 P.3d 321 (2014).

Deprived of meaningful defense

Due process rights are violated when the motorist's requests for alcohol test results are met only minutes before the hearing and a continuance is denied.

Cal.—[Petrus v. State Dept. of Motor Vehicles](#), 194 Cal. App. 4th 1240, 123 Cal. Rptr. 3d 686 (4th Dist. 2011).

6

Cal.—[Petrus v. State Dept. of Motor Vehicles](#), 194 Cal. App. 4th 1240, 123 Cal. Rptr. 3d 686 (4th Dist. 2011).

Ill.—[People v. Morales](#), 2015 IL App (1st) 131207, 388 Ill. Dec. 687, 24 N.E.3d 1260 (App. Ct. 1st Dist. 2015).

Mo.—[Strup v. Director of Revenue](#), 311 S.W.3d 793 (Mo. 2010).

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Ill.—[People v. Morales](#), 2015 IL App (1st) 131207, 388 Ill. Dec. 687, 24 N.E.3d 1260 (App. Ct. 1st Dist. 2015).

Mo.—[Strup v. Director of Revenue](#), 311 S.W.3d 793 (Mo. 2010).

8

Cal.—[Petrus v. State Dept. of Motor Vehicles](#), 194 Cal. App. 4th 1240, 123 Cal. Rptr. 3d 686 (4th Dist. 2011).

Ill.—[People v. Morales](#), 2015 IL App (1st) 131207, 388 Ill. Dec. 687, 24 N.E.3d 1260 (App. Ct. 1st Dist. 2015).

Kan.—[Martin v. Kansas Dept. of Revenue](#), 285 Kan. 625, 176 P.3d 938 (2008).

9 Mo.—[Strup v. Director of Revenue](#), 311 S.W.3d 793 (Mo. 2010).

10 Alaska—[Alvarez v. State, Dept. of Admin., Div. of Motor Vehicles](#), 249 P.3d 286 (Alaska 2011).

11 **Revocation proceedings not criminal**

12 W. Va.—[Harrison v. Commissioner, Div. of Motor Vehicles](#), 226 W. Va. 23, 697 S.E.2d 59 (2010).

13 Cal.—[Ziehlke v. Valverde](#), 191 Cal. App. 4th 1525, 120 Cal. Rptr. 3d 655 (3d Dist. 2011).

14 Mo.—[Wei v. Director of Revenue](#), 335 S.W.3d 558 (Mo. Ct. App. S.D. 2011).

15 Pa.—[Kozieniak v. Com., Dept. of Transp., Bureau of Driver Licensing](#), 100 A.3d 326 (Pa. Commw. Ct. 2014).

Wash.—[City of Redmond v. Bagby](#), 155 Wash. 2d 59, 117 P.3d 1126 (2005).

Mandatory suspension for underage consumption

Ill.—[People v. Boeckmann](#), 238 Ill. 2d 1, 342 Ill. Dec. 537, 932 N.E.2d 998 (2010).

Nolo contendere plea sufficient conviction

W. Va.—[Harrison v. Commissioner, Div. of Motor Vehicles](#), 226 W. Va. 23, 697 S.E.2d 59 (2010).

Idaho—[Platz v. State](#), 154 Idaho 960, 303 P.3d 647 (Ct. App. 2013).

Fla.—[Carrizosa v. Department of Highway Safety and Motor Vehicles](#), 124 So. 3d 1017 (Fla. 2d DCA 2013).

N.Y.—[People v. Salazar](#), 112 A.D.3d 5, 973 N.Y.S.2d 140 (1st Dep’t 2013), leave to appeal denied, 22 N.Y.3d 1090, 981 N.Y.S.2d 676, 4 N.E.3d 978 (2014).

16D C.J.S. Constitutional Law § 2354

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

b. Licensing Motor Vehicles and Operators

§ 2354. Suspension or revocation of motor vehicle operator's license—Implied consent laws

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4356, 4358

The application of an implied consent law generally does not deprive a licensed motor vehicle operator of due process when the authorities seek to suspend or revoke the driver's license for driving while under the influence of alcohol or drugs.

There is no due process infringement by depriving a licensed driver of a license under an implied consent law based on the driver's refusal to submit to a sobriety test when so requested by the authorities in a proper case.¹ While a driver subject to license suspension or revocation under a state implied consent law has due-process rights,² implied consent laws generally do not infringe those rights³ since the statutes grant a right to refuse testing rather than denying the right.⁴

Due process does mandate warnings of the effect of a driver's implied consent to testing for alcohol or drugs,⁵ and the failure to provide the required information may preclude further action against the driver's holding of a license.⁶ Incorrect information raises due process concerns if the information understates the consequences of a refusal as an offense carrying criminal penalties

and is shown to have been prejudicial.⁷ It must not appear that the warning fails to inform the arrestee of the consequences of refusal or misleads the arrestee into believing that the consequences are different than what the law actually provides.⁸ In contrast, an implied consent advisory does not violate the driver's substantive due process rights by overstating the grounds for license revocation, when it nonetheless correctly states the sanction for refusing the test, since the warning then adequately advances the state's interest in giving arrested persons the information they need to make reasoned and informed decisions.⁹

Due process does mandate notice of the suspension or revocation¹⁰ and a subsequent hearing on a suspension or revocation under an implied consent law¹¹ and judicial review.¹² Due process does require that an administrative review hearing under an implied consent law provide a sufficient opportunity for stating and preserving issues for judicial review, including the presentation of evidence and the cross-examination of witnesses, and a hearing that fails to do so is insufficient.¹³

Implied consent hearings are civil proceedings, not criminal, and in the absence of a threat of resulting incarceration, there is no due process right to court-appointed counsel.¹⁴

An implied consent law does not require that an arrested driver's decision about a breath test be a fully informed decision or that it be made with the advice of counsel.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Statute criminalizing a driver's refusal to submit to blood alcohol testing, which punished the assertion of the fundamental right to a reasonable search as guaranteed by the Fourth Amendment, was not narrowly tailored to serving the compelling criminal justice and public safety interests of the State in combating drunk driving and prosecuting offenders for driving under the influence (DUI), and thus violated due process; a warrant was an available tool capable of achieving the same goals as those targeted by the test refusal statute, if a warrant was available, the State could serve all its criminal justice purposes without punishing the exercise of a constitutional right, and refusal penalty statute could be tailored to apply to those specific situations where a search would be constitutional under the Fourth Amendment. [U.S.C.A. Const.Amend. 4, 14](#); West's [K.S.A. 8-1025](#); [K.S.A. Const.Bill of Rights, § 15](#). *State v. Ryce*, 368 P.3d 342 (Kan. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).
- 2 Alaska—[Olson v. State](#), 260 P.3d 1056 (Alaska 2011).
Kan.—[Manzano v. Kansas Dept. of Revenue](#), 50 Kan. App. 2d 263, 324 P.3d 321 (2014).
Md.—[Najafi v. Motor Vehicle Admin.](#), 418 Md. 164, 12 A.3d 1255 (2011).
Minn.—[In re Source Code Evidentiary Hearings in Implied Consent Matters](#), 816 N.W.2d 525 (Minn. 2012).
Idaho—[State v. Kling](#), 150 Idaho 188, 245 P.3d 499 (Ct. App. 2010).
Md.—[Najafi v. Motor Vehicle Admin.](#), 418 Md. 164, 12 A.3d 1255 (2011).
Minn.—[State v. Omwega](#), 769 N.W.2d 291 (Minn. Ct. App. 2009).
N.D.—[Whitecalfe v. North Dakota Dept. of Transp.](#), 2007 ND 32, 727 N.W.2d 779 (N.D. 2007).
- 3 **No substantive due process violation**

Minn.—[State v. Wiseman](#), 816 N.W.2d 689 (Minn. Ct. App. 2012), cert. denied on other grounds, 133 S. Ct. 1585, 185 L. Ed. 2d 578 (2013).

Substantive due process violation

Wash.—[Nielsen v. Washington State Dept. of Licensing](#), 177 Wash. App. 45, 309 P.3d 1221 (Div. 1 2013).

A.L.R. Library

Driving while intoxicated: subsequent consent to sobriety test as affecting initial refusal, 28 A.L.R.5th 459.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 A.L.R.2d 1064 (sec. 7 superseded in part Driving while intoxicated: subsequent consent to sobriety test as affecting initial refusal, 28 A.L.R.5th 459).

4 Iowa—[State v. Hutton](#), 796 N.W.2d 898 (Iowa 2011).

5 Mont.—[State v. Turberville](#), 2003 MT 340, 318 Mont. 451, 81 P.3d 475 (2003).

Alaska—[Olson v. State](#), 260 P.3d 1056 (Alaska 2011).

Idaho—[State v. Kling](#), 150 Idaho 188, 245 P.3d 499 (Ct. App. 2010).

Warning that refusal is a crime

Minn.—[State v. Melde](#), 725 N.W.2d 99 (Minn. 2006).

Standardized Advice of Rights form

Md.—[Najafi v. Motor Vehicle Admin.](#), 418 Md. 164, 12 A.3d 1255 (2011).

Private license warning sufficient

Kan.—[State v. Becker](#), 36 Kan. App. 2d 828, 145 P.3d 938 (2006).

Mo.—[Jones v. Director of Revenue](#), State of Missouri, 237 S.W.3d 624 (Mo. Ct. App. E.D. 2007).

Not misleading or inaccurate

Mont.—[State v. Turberville](#), 2003 MT 340, 318 Mont. 451, 81 P.3d 475 (2003).

Warning is only matter of legislative grace

Ga.—[Lee v. State](#), 324 Ga. App. 28, 749 S.E.2d 32 (2013).

6 Idaho—[State v. Kling](#), 150 Idaho 188, 245 P.3d 499 (Ct. App. 2010).

7 Alaska—[Olson v. State](#), 260 P.3d 1056 (Alaska 2011).

8 Mo.—[Baldridge v. Director of Revenue](#), State of Mo., 82 S.W.3d 212 (Mo. Ct. App. W.D. 2002).

9 Iowa—[State v. Hutton](#), 796 N.W.2d 898 (Iowa 2011).

10 Minn.—[State v. Omwega](#), 769 N.W.2d 291 (Minn. Ct. App. 2009).

Sufficient time for notice

Minn.—[Williams v. Commissioner of Public Safety](#), 830 N.W.2d 442 (Minn. Ct. App. 2013).

Advised of right to hearing

N.D.—[Whitecalfe v. North Dakota Dept. of Transp.](#), 2007 ND 32, 727 N.W.2d 779 (N.D. 2007).

11 Idaho—[State v. Kling](#), 150 Idaho 188, 245 P.3d 499 (Ct. App. 2010).

Kan.—[Manzano v. Kansas Dept. of Revenue](#), 50 Kan. App. 2d 263, 324 P.3d 321 (2014).

Minn.—[Thole v. Commissioner of Public Safety](#), 831 N.W.2d 17 (Minn. Ct. App. 2013).

N.D.—[Whitecalfe v. North Dakota Dept. of Transp.](#), 2007 ND 32, 727 N.W.2d 779 (N.D. 2007).

Delay not prejudicial

Minn.—[Riehm v. Commissioner of Public Safety](#), 745 N.W.2d 869 (Minn. Ct. App. 2008).

Filing fee as permitted condition

Wash.—[Didlake v. Washington State](#), 345 P.3d 43 (Wash. Ct. App. Div. 1 2015).

12 Kan.—[Manzano v. Kansas Dept. of Revenue](#), 50 Kan. App. 2d 263, 324 P.3d 321 (2014).

Minn.—[State v. Omwega](#), 769 N.W.2d 291 (Minn. Ct. App. 2009).

Mo.—[Korte v. Director of Revenue](#), 352 S.W.3d 610 (Mo. Ct. App. S.D. 2011).

Right to appeal as protected interest

Wash.—[Nielsen v. Washington State Dept. of Licensing](#), 177 Wash. App. 45, 309 P.3d 1221 (Div. 1 2013).

13 Kan.—[Manzano v. Kansas Dept. of Revenue](#), 50 Kan. App. 2d 263, 324 P.3d 321 (2014).

14 Minn.—[Thole v. Commissioner of Public Safety](#), 831 N.W.2d 17 (Minn. Ct. App. 2013).

15 Or.—[Staglin v. Driver And Motor Vehicle Services Div.](#), 227 Or. App. 240, 205 P.3d 90 (2009).

16D C.J.S. Constitutional Law § 2355

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

c. Licensing of Attorneys

§ 2355. Initial licensing or bar admission

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4273(1), 4273(2)

Admission to the practice of law is within the protection of the guaranty of substantive and procedural due process.

A state cannot exclude a person from the practice of law in a manner or for reasons that contravene due process,¹ but attorneys are not a protected class under the Constitution, and a licensing statute distinguishing attorneys from others requires only a rational basis for due process purposes.² Any protections afforded a law license are subject to the lowest standard of review for due process protections.³

There is no substantive due process right to practice law in a particular role or location,⁴ but a license to practice law, once lawfully obtained, is a property interest subject to procedural due process protection,⁵ as is the basis for protections afforded in the suspension or revocation of attorney licenses or bar admission.⁶ An attorney's protected interest in existing licensure is not a sufficient basis for a claim of due process violations by injury to the attorney's reputation when there is no loss of licensing or bar admission.⁷

An applicant for admission to the bar, otherwise eligible for admission to the practice of law, is entitled to due process protection in seeking to obtain admission,⁸ and bar admission requirements must bear a rational relationship to the applicant's fitness or capacity to practice law.⁹ Bar admission requirements and proceedings do not violate a bar applicant's due process rights by fair and impartial inquiries and hearings into the propriety of the applicant's background in relation to the applicant's fitness for admission to the bar¹⁰ since a state may require high standards of qualification for admission to the bar, such as good moral character or proficiency in its law, without violating due process.¹¹ The bar admission examiners may also exercise reasonable discretion in requiring adherence to admission rules within the bounds of due process, absent a showing of abuse or arbitrary action.¹²

The fundamental requirement of due process for applicants for admission to the bar is the opportunity to be heard at a meaningful time and in a meaningful manner, and to have a fair trial in a fair tribunal.¹³ A bar applicant is entitled to sufficient notice of denial, including specific reasons and documentation,¹⁴ and the right of judicial review is generally accorded.¹⁵

Specialty certification.

An attorney seeking certification as a specialist with the state bar does not have a constitutionally protected property interest in obtaining certification, thus precluding a challenge on procedural due process grounds against the bar's use of a confidential peer review component as part of the process; the denial of board certification imposes no restriction on a licensed attorney's ability to practice law in the state.¹⁶

License fees.

A state's imposition of a license fee on attorneys does not violate due process,¹⁷ and no due process violation occurs when an attorney is not permitted to practice law for nonpayment of required fees.¹⁸

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Footnotes

1 U.S.—[Schware v. Board of Bar Exam. of State of N.M.](#), 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957); [Bright v. Gallia County, Ohio](#), 753 F.3d 639 (6th Cir. 2014), cert. denied, 135 S. Ct. 1561 (2015); [Bolls v. Virginia Bd. of Bar Examiners](#), 811 F. Supp. 2d 1260 (E.D. Va. 2011), aff'd, 464 Fed. Appx. 131 (4th Cir. 2012).
Ark.—[Smith v. State Bd. of Law Examiners](#), 357 Ark. 628, 187 S.W.3d 842 (2004).
Utah—[In re Arnovick](#), 2002 UT 71, 52 P.3d 1246 (Utah 2002).

A.L.R. Library

Procedural due process requirements in proceedings involving applications for admission to bar, 2 A.L.R.3d 1266.

2 U.S.—[U.S. v. Clark](#), 195 F.3d 446 (9th Cir. 1999).
N.J.—[New Jersey State Bar Ass'n v. State](#), 382 N.J. Super. 284, 888 A.2d 526 (Ch. Div. 2005), order amended on other grounds, 387 N.J. Super. 24, 902 A.2d 944 (App. Div. 2006).

Rational basis for professional pro bono rules

U.S.—[Schwarz v. Kogan](#), 132 F.3d 1387 (11th Cir. 1998).

3 Ark.—[Chandler v. Martin ex rel. State](#), 2014 Ark. 219, 433 S.W.3d 884 (2014).

4 U.S.—[Bright v. Gallia County, Ohio](#), 753 F.3d 639 (6th Cir. 2014), cert. denied, 135 S. Ct. 1561 (2015).

5 U.S.—[Casella v. Pennsylvania Interest on Lawyers Trust Account Bd.](#), 47 Fed. Appx. 193 (3d Cir. 2002).

Ala.—[Alabama State Bar v. McBrayer](#), 20 So. 3d 100 (Ala. 2009).

Kan.—[In re Woodring](#), 289 Kan. 173, 210 P.3d 120 (2009).

Mass.—[In re Gargano](#), 460 Mass. 1022, 957 N.E.2d 235 (2011).

N.C.—[North Carolina State Bar v. Rogers](#), 164 N.C. App. 648, 596 S.E.2d 337 (2004).

Interest after pro hac vice admission

U.S.—[Belue v. Leventhal](#), 640 F.3d 567 (4th Cir. 2011).

Ga.—[Ford Motor Co. v. Young](#), 322 Ga. App. 348, 745 S.E.2d 299 (2013).

Ohio—[Davis v. Marcotte](#), 193 Ohio App. 3d 102, 2011-Ohio-1189, 951 N.E.2d 117 (10th Dist. Franklin County 2011).

No interest before pro hac vice admission

U.S.—[Leis v. Flynt](#), 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979); [Paciulan v. George](#), 229 F.3d 1226 (9th Cir. 2000).

6 [§ 2357](#).

7 U.S.—[U.S. v. Sigma Intern., Inc.](#), 300 F.3d 1278 (11th Cir. 2002).

8 U.S.—[Morrison v. Board of Law Examiners of State of N.C.](#), 453 F.3d 190 (4th Cir. 2006).

Ariz.—[In re Hamm](#), 211 Ariz. 458, 123 P.3d 652 (2005).

N.D.—[In re Application of Graves for Admission to Bar of State](#), 2004 ND 64, 677 N.W.2d 215 (N.D. 2004).

Court rule not procedural due process matter

U.S.—[Gallo v. U.S. Dist. Court For Dist. of Arizona](#), 349 F.3d 1169 (9th Cir. 2003).

9 U.S.—[LeClerc v. Webb](#), 419 F.3d 405 (5th Cir. 2005).

Ark.—[Smith v. State Bd. of Law Examiners](#), 357 Ark. 628, 187 S.W.3d 842 (2004).

Nev.—[In re Galardi](#), 2010 WL 5550642 (Nev. 2010).

10 U.S.—[Lawrence v. Chabot](#), 182 Fed. Appx. 442, 2006 FED App. 0347N (6th Cir. 2006).

Mass.—[In re Admission to Bar of Com.](#), 444 Mass. 393, 828 N.E.2d 484 (2005).

R.I.—[In re Vose](#), 93 A.3d 33 (R.I. 2014).

Fair procedures required

N.D.—[In re Application of Graves for Admission to Bar of State](#), 2004 ND 64, 677 N.W.2d 215 (N.D. 2004).

Alleged bias not established

Ariz.—[In re Hamm](#), 211 Ariz. 458, 123 P.3d 652 (2005).

Inquiry not criminal trial

N.H.—[In re Bar Applicant ADM-2004-176](#), 152 N.H. 523, 880 A.2d 439 (2005).

11 Utah—[In re Arnovick](#), 2002 UT 71, 52 P.3d 1246 (Utah 2002).

12 Vt.—[Ball v. Board of Bar Examiners](#), 183 Vt. 628, 2008 VT 49, 950 A.2d 1210 (2008).

Discretion to waive report requirement

Mass.—[Corliss v. Board of Bar Examiners](#), 437 Mass. 1023, 773 N.E.2d 944 (2002).

13 Ariz.—[In re Hamm](#), 211 Ariz. 458, 123 P.3d 652 (2005).

Vt.—[In re Hirsch](#), 2014 VT 28, 95 A.3d 412 (Vt. 2014), cert. denied, 135 S. Ct. 674, 190 L. Ed. 2d 392 (2014).

Full panoply of procedural rights afforded

U.S.—[Lawrence v. Chabot](#), 182 Fed. Appx. 442, 2006 FED App. 0347N (6th Cir. 2006).

Right to confront witnesses not denied

N.H.—[In re Bar Applicant ADM-2004-176](#), 152 N.H. 523, 880 A.2d 439 (2005).

Judicial adoption of hearing report

U.S.—[Wiesner v. Nardelli](#), 307 Fed. Appx. 484 (2d Cir. 2008).

Fair and impartial tribunal required

Mass.—[Corliss v. Board of Bar Examiners](#), 437 Mass. 1023, 773 N.E.2d 944 (2002).

14 N.D.—[In re Application of Graves for Admission to Bar of State](#), 2004 ND 64, 677 N.W.2d 215 (N.D. 2004).

Vt.—[In re Hirsch](#), 2014 VT 28, 95 A.3d 412 (Vt. 2014), cert. denied, 135 S. Ct. 674, 190 L. Ed. 2d 392 (2014).

15 U.S.—[Lawrence v. Chabot](#), 182 Fed. Appx. 442, 2006 FED App. 0347N (6th Cir. 2006).

16 U.S.—[Doe v. Florida Bar](#), 630 F.3d 1336 (11th Cir. 2011).

17 N.J.—[New Jersey State Bar Ass'n v. State](#), 382 N.J. Super. 284, 888 A.2d 526 (Ch. Div. 2005), order amended on other grounds, 387 N.J. Super. 24, 902 A.2d 944 (App. Div. 2006).

18 Mich.—[Ayres v. Hadaway](#), 303 Mich. 589, 6 N.W.2d 905 (1942).

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16D C.J.S. Constitutional Law § 2356

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

c. Licensing of Attorneys

§ 2356. Initial licensing or bar admission—Bar examination

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4273(1), 4273(2)

Requirements for admission to take a bar examination as a condition of obtaining a license to practice law, and the requirements of the examination, are within the protection of the guaranty of substantive and procedural due process.

Due process is not offended by requirements for admission to take a bar examination as a condition of obtaining a license to practice law, including specific educational qualifications,¹ or by the requirements for passing the examination.² While bar examination procedures are reviewable for due process infringements,³ denying admission for failure to pass an examination is not a denial of substantive due process.⁴ Technical requirements for the conduct or administration of bar examinations do not deny the applicants substantive due process when the requirements are rationally related to the bar's interests in the efficient administration of the examination.⁵

A predeprivation hearing is not required before a determination that a bar applicant is disqualified from taking the bar examination,⁶ and there is no due process deprivation when an applicant is entitled to a judicial review of requirements for taking

the bar examination and does not act on the right.⁷ A rule permitting unsuccessful applicants to petition the court for a review of grades assessed on a bar examination satisfies procedural due process requirements for a full and fair opportunity.⁸ Due process does not require notice of specific examination scores, or scores in each subject area, or information about the examination grading process, when the applicant has an opportunity to challenge the grade in court and may retake the examination.⁹

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Footnotes

1 U.S.—[Onyuke v. New Jersey](#), 242 Fed. Appx. 794 (3d Cir. 2007).
Foreign law school equivalency rule
U.S.—[LeClerc v. Webb](#), 419 F.3d 405 (5th Cir. 2005).
A.L.R. Library
Procedural due process requirements in proceedings involving applications for admission to bar, 2 A.L.R.3d 1266.
Validity, under Federal Constitution, of state bar examination procedures, 30 A.L.R. Fed. 934.

2 U.S.—[Raymond v. O'Connor](#), 526 Fed. Appx. 526 (6th Cir. 2013); [National Ass'n for Advancement of Multijurisdiction Practice v. Berch](#), 973 F. Supp. 2d 1082 (D. Ariz. 2013).
Limit on number of examinations
U.S.—[Younger v. Colorado State Bd. of Law Examiners](#), 625 F.2d 372 (10th Cir. 1980).
Sufficient notice of requirements
Utah—[McBride v. Utah State Bar](#), 2010 UT 60, 242 P.3d 769 (Utah 2010).
3 U.S.—[National Ass'n for Advancement of Multijurisdiction Practice v. Berch](#), 973 F. Supp. 2d 1082 (D. Ariz. 2013).
Utah—[McBride v. Utah State Bar](#), 2010 UT 60, 242 P.3d 769 (Utah 2010).
4 Utah—[In re Arnovick](#), 2002 UT 71, 52 P.3d 1246 (Utah 2002).
5 Utah—[McBride v. Utah State Bar](#), 2010 UT 60, 242 P.3d 769 (Utah 2010).
6 Utah—[McBride v. Utah State Bar](#), 2010 UT 60, 242 P.3d 769 (Utah 2010).
7 U.S.—[Gordon v. State Bar of California](#), 369 Fed. Appx. 833 (9th Cir. 2010).
8 U.S.—[National Ass'n for Advancement of Multijurisdiction Practice v. Berch](#), 973 F. Supp. 2d 1082 (D. Ariz. 2013).
9 U.S.—[National Ass'n for Advancement of Multijurisdiction Practice v. Berch](#), 973 F. Supp. 2d 1082 (D. Ariz. 2013).
No obligation to release examination paper
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16D C.J.S. Constitutional Law § 2357

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

2. Particular Types of Licenses

c. Licensing of Attorneys

§ 2357. Discipline of attorneys; suspension or revocation of license

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4273(3)

Disciplinary procedures and actions against licensed attorneys, or the suspension or revocation of an attorney's license to practice law, require adherence to substantive and procedural due process of law.

For due process purposes, an attorney has a protected property interest in a license to practice law, after issuance of the license,¹ and cannot be deprived of the license without due process of law, requiring compliance with substantive² and procedural due process,³ no less than any other litigant.⁴

An attorney subject to disciplinary proceedings is entitled to procedural due process safeguards,⁵ designed to collectively ensure fundamental fairness,⁶ though not an ideal set of procedures,⁷ whether the proceedings may result in a sanction,⁸ suspension,⁹ disbarment,¹⁰ or reciprocal discipline predicated on disciplinary action in another court or jurisdiction.¹¹

Procedural due process in attorney disciplinary proceedings does not entail the full panoply of rights afforded an accused in a criminal case,¹² but the attorney must be given timely¹³ and adequate notice of the charges,¹⁴ as may require fair notice¹⁵ and a reasonably definite statement of the charges.¹⁶ The attorney is entitled to an opportunity to defend against the charges,¹⁷ adequate notice of the hearing,¹⁸ and an opportunity to present evidence,¹⁹ including evidence of good character and mitigating circumstances,²⁰ and an opportunity to call and examine witnesses,²¹ and confront and cross-examine witnesses,²² before an unbiased tribunal.²³ The tribunal's merger of investigative and judicial functions is not, in itself, a due process violation.²⁴

Due process does not require a jury trial in attorney disciplinary proceedings.²⁵

The attorney's absence from the hearing is not a violation when adequate notice is given.²⁶

Due process does not require the attorney be represented by counsel.²⁷

Automatic or summary discipline.

A provision for automatic discipline of attorneys for delinquency in the payment of bar license fees, without advance notice or any opportunity to be heard, violates due process.²⁸ Due process, however, does not preclude summary²⁹ or automatic discipline for an attorney's conviction of specified crimes³⁰ although there is contrary authority that a hearing is still required despite the conviction.³¹

CUMULATIVE SUPPLEMENT

Cases:

Attorney disciplinary proceedings before Missouri Supreme Court met the minimum due process requirements for Patent and Trademark Office (PTO) to impose reciprocal discipline of indefinite suspension from practice, with ability to seek reinstatement after one year, for attorney's violation of rule prohibiting communication with represented party and for engaging in conduct that was prejudicial to administration of justice, where detailed information notified attorney about charges and attorney was provided opportunity to respond, participated in evidentiary hearing, filed written brief, and was allowed to present written argument against decision. [U.S. Const. Amend. 14, 35 U.S.C.A. § 32; 37 C.F.R. § 11.24\(d\)\(1\)\(i\); Mo. Sup. Ct. R. 4-4.2, 4-8.4. Chaganti v. Lee, 187 F. Supp. 3d 682 \(E.D. Va. 2016\)](#), appeal dismissed, ([Fed. Cir. 16-2133](#))(July 18, 2016).

The United States Patent and Trademark Office's (USPTO's) attorney discipline procedures were fundamentally fair and consistent with due process, as required for imposition of reciprocal discipline; attorney was given notice of USPTO proceedings and allegations against him, attorney received and signed for several communications requesting information for his disciplinary investigation, attorney then received a complaint, notice of hearing and order, and default judgment notice, all of which were received and signed for at attorney's address, and USPTO allowed attorneys the opportunity to respond in disciplinary proceedings, but attorney failed to do so. [U.S. Const. Amend. 14; Minn.R. Lawyers Prof. Resp. 12\(d\). In re Disciplinary Action against Stewart, 899 N.W.2d 476 \(Minn. 2017\).](#)

North Dakota disciplinary proceedings were consistent with principles of fundamental fairness and due process, for purpose of imposing reciprocal discipline, where North Dakota Disciplinary Board served attorney with amended summons and amended petition for discipline, attorney had opportunity to present defense and offer mitigating circumstances at each phase of disciplinary proceedings. [U.S. Const. Amend. 14. In re Disciplinary Action against Fahrenholtz, 896 N.W.2d 845 \(Minn. 2017\).](#)

Disbarment was warranted as reciprocal discipline for attorney disbarred from practice of law in Illinois following his guilty plea to federal charges of conspiracy to distribute 1,000 kilograms or more of marijuana; although attorney's misconduct was unrelated to the practice of law, it gave rise to a felony drug conviction, and attorney failed to participate in Minnesota's disciplinary proceeding in any way. 52 *M.S.A.*, *Lawyers Prof.Resp.*, Rule 12(d). *In re Disciplinary Action against Huff*, 872 N.W.2d 750 (Minn. 2015).

Dismissal of disciplinary action against attorney was warranted, where a panel of the Board of Professional Conduct dismissed the three charged violations for insufficient evidence, the Board found attorney had violated two Professional Conduct Rules that were neither charged in the complaint nor mentioned until after the close of evidence, attorney's due process rights were violated by the Board's finding as he did not have fair notice of the charges against him, and attorney did not expressly or impliedly consent to amendment of the disciplinary complaint. [U.S. Const. Amend. 14](#); [Ohio Civ. R. 15\(B\)](#). [Disciplinary Counsel v. Reinheimer](#), 162 Ohio St. 3d 219, 2020-Ohio-3941, 165 N.E.3d 235 (2020).

Attorney was not denied due process based on his inability to obtain all documents he sought during discovery in disciplinary proceeding based on attorney's alleged use of unethical billing practices and charging of excessive fees; none of the affected clients agreed to an unqualified waiver of their attorney-client privilege, nevertheless, the clients provided a significant number of records, and attorney made no showing that evidence on his law-firm laptop was actually destroyed or that it was destroyed in bad faith. [U.S. Const. Amend. 14](#); Rules of Prof.Conduct, Rule 1.5(a). [Disciplinary Counsel v. Smith](#), 152 Ohio St. 3d 337, 2017-Ohio-9087, 96 N.E.3d 234 (2017).

Attorney's procedural due process rights were not violated by procedure Supreme Court used in reviewing and increasing sanctions recommended by hearing panel of Board of Professional Responsibility in attorney disciplinary matter; attorney was given notice of alleged violations of professional conduct rules when Board filed petition for discipline, American Bar Association (ABA) standards provided notice of proposed range of punishment, and text of rule governing attorney discipline provided attorney with notice of Supreme Court's duty to review recommended punishment with view to attaining uniformity and with its authority to increase or decrease punishment as it deemed appropriate, with attorney having been provided with specific notice of Court's intent to consider increased punishment. [U.S. Const. Amend. 14, § 1](#); [Tenn. Const. art. 1, § 8](#); [Tenn. Sup. Ct. Rule 9, § 15.4\(a\)](#). [In re Walwyn](#), 531 S.W.3d 131 (Tenn. 2017).

[END OF SUPPLEMENT]

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4 N.D.—[In re Disciplinary Action Against Overboe](#), 2014 ND 62, 844 N.W.2d 851 (N.D. 2014).

5 Colo.—[In re Foster](#), 253 P.3d 1244 (Colo. 2011).

U.S.—[In re Lehtinen](#), 564 F.3d 1052 (9th Cir. 2009).

Conn.—[Smigelski v. Dubois](#), 153 Conn. App. 186, 100 A.3d 954 (2014).

Minn.—[In re Disciplinary Action against Michael](#), 836 N.W.2d 753 (Minn. 2013).

Failure to follow disciplinary procedures

6 U.S.—[Adams v. Ford Motor Co.](#), 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011).

U.S.—[In re Barach](#), 540 F.3d 82 (1st Cir. 2008).

Minn.—[In re Disciplinary Action against Hawkins](#), 834 N.W.2d 663 (Minn. 2013).

Tenn.—[Long v. Board of Professional Responsibility of Supreme Court](#), 435 S.W.3d 174 (Tenn. 2014).

Procedural fairness

7 Utah—[Johnson v. Office of Professional Conduct](#), 2014 UT 57, 342 P.3d 280 (Utah 2014).

U.S.—[In re Barach](#), 540 F.3d 82 (1st Cir. 2008).

Particular procedures depend on circumstances

8 W. Va.—[Lawyer Disciplinary Bd. v. Stanton](#), 233 W. Va. 639, 760 S.E.2d 453 (2014).

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9 U.S.—[In re Harper](#), 725 F.3d 1253 (10th Cir. 2013).

10 U.S.—[In re Cook](#), 551 F.3d 542 (6th Cir. 2009); [In re Koehler](#), 521 Fed. Appx. 615 (9th Cir. 2013); [In re Parker](#), 485 Fed. Appx. 989 (11th Cir. 2012).

11 U.S.—[In re Roman](#), 601 F.3d 189 (2d Cir. 2010); [In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

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12 N.Y.—[In re Simms-Parris](#), 112 A.D.3d 26, 973 N.Y.S.2d 281 (2d Dep't 2013), leave to appeal dismissed, 24 N.Y.3d 1039, 998 N.Y.S.2d 163, 22 N.E.3d 1032 (2014).

U.S.—[In re Harper](#), 725 F.3d 1253 (10th Cir. 2013); [Committee on the Conduct of Attorneys v. Oliver](#), 510 F.3d 1219 (10th Cir. 2007).

Colo.—[Matter of Olsen](#), 2014 CO 42, 326 P.3d 1004 (Colo. 2014).

Tenn.—[Hyman v. Board of Professional Responsibility of Supreme Court](#), 437 S.W.3d 435 (Tenn. 2014).

Not encumbered by technical rules

Minn.—[In re Disciplinary Action against Michael](#), 836 N.W.2d 753 (Minn. 2013).

Preponderance standard sufficient

U.S.—[In re Barach](#), 540 F.3d 82 (1st Cir. 2008).

Speedy trial not required

13 U.S.—[In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

Oklahoma—[State ex rel. Oklahoma Bar Ass'n v. Wilcox](#), 2009 OK 81, 227 P.3d 642 (Okla. 2009).

14 U.S.—[Federal Grievance Committee v. Williams](#), 743 F.3d 28 (2d Cir. 2014), as amended on other grounds, (Apr. 10, 2014) and cert. denied, 135 S. Ct. 1423 (2015); [In re Koehler](#), 521 Fed. Appx. 615 (9th Cir. 2013); [In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

Conn.—[Smigelski v. Dubois](#), 153 Conn. App. 186, 100 A.3d 954 (2014).

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R.I.—[In re McKenna](#), 110 A.3d 1126 (R.I. 2015).

Utah—[Johnson v. Office of Professional Conduct](#), 2014 UT 57, 342 P.3d 280 (Utah 2014).

Notice of potential sanction not provided

U.S.—[Adams v. Ford Motor Co.](#), 55 V.I. 1310, 653 F.3d 299 (3d Cir. 2011).

Allegations but not evidentiary facts

15 Ariz.—[In re Aubuchon](#), 233 Ariz. 62, 309 P.3d 886 (2013), as amended, (Oct. 25, 2013) and cert. denied, 134 S. Ct. 1309, 188 L. Ed. 2d 360 (2014).

U.S.—[In re Harper](#), 725 F.3d 1253 (10th Cir. 2013); [In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

W. Va.—[Lawyer Disciplinary Bd. v. Stanton](#), 233 W. Va. 639, 760 S.E.2d 453 (2014).

16 U.S.—[In re Sibley](#), 564 F.3d 1335 (D.C. Cir. 2009).

Sufficiently clear statement of charges

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W. Va.—[Lawyer Disciplinary Bd. v. Stanton](#), 233 W. Va. 639, 760 S.E.2d 453 (2014).

Misconduct must be charged

30 D.C.—*In re Krouner*, 920 A.2d 1039 (D.C. 2007).
31 N.Y.—*Matter of Simon*, 146 A.D.2d 393, 540 N.Y.S.2d 791 (1st Dep’t 1989).
Minn.—*In re Disciplinary Action Against Koss*, 572 N.W.2d 276 (Minn. 1997).
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16D C.J.S. Constitutional Law § 2358

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

3. License Taxes

§ 2358. General standards and principles applicable to license taxes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4146, 4262, 4267 to 4297

A license tax complies with procedural due process when it affords safeguards against the wrongful deprivation of property, and it complies with substantive due process when founded on a rational basis.

A license tax imposed by a state upon a particular activity, business, or occupation must comply with due process requirements.¹ Since the collection of a license tax, as is true of any tax, constitutes a deprivation of property, due process standards require offering the taxpayer procedural safeguards against unlawful extractions.² Governments may satisfy the due process requirement by offering taxpayers one of three possible recourses: (1) a predeprivation remedy, which permits the taxpayer a meaningful opportunity to withhold the tax and to dispute the amount owed; (2) a postdeprivation remedy, which allows taxpayers to challenge the amount paid and to obtain a refund if it is determined that the tax was wrongfully collected; or (3) a combination of both.³ However, due process does not require providing the taxpayer the right to notice, a hearing, and the right to contest and appeal the amount of the tax, apart from the notice and opportunity incident to the ordinary course of litigation to collect and enforce the tax.⁴ In other words, the taxpayer can refuse to pay the tax, or pay the tax under protest, in which case the taxpayer's due process rights are protected by litigation constituting a clear and certain predeprivation remedy, including notice, an opportunity to be heard, and judicial review.⁵ The provision of a business license tax ordinance permitting a disputed tax

to be paid under protest and the institution of a suit seeking recovery of the payment satisfies the taxpayers' due process rights by providing a remedy for any wrongful assessment.⁶

The imposition of a license tax should not amount to a taking of property without due process of law,⁷ as is the case of a retroactive tax,⁸ nor may the tax amount to an uncompensated confiscation by the attempt to tax things beyond the legislative power for reasons other than revenue.⁹ It is not a due process violation, however, if a taxing authority chooses to assess both a regulatory and a revenue-producing license tax in a single assessment when it has the authority to do either.¹⁰

Due process does not bind a state or political subdivision by inflexible rules of equality of taxation in imposing license taxes upon businesses and occupations,¹¹ but a license tax should have a reasonable or rational basis to meet the demands of substantive due process,¹² bearing a reasonable relationship to benefits conferred,¹³ and must not be nondiscriminatory.¹⁴

A license tax may be imposed on a foreign corporation doing business within the taxing state,¹⁵ requiring activity or transactions for the purpose of financial profit or gain in the taxing state.¹⁶

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Footnotes

- 1 U.S.—[Municipal Ass'n of South Carolina v. Service Ins. Co., Inc.](#), 786 F. Supp. 2d 1031 (D.S.C. 2011), rev'd on other grounds, 709 F.3d 276 (4th Cir. 2013).
Ky.—[Phillips v. Com.](#), 324 S.W.3d 741 (Ky. Ct. App. 2010).
S.C.—[Carter v. Linder](#), 303 S.C. 119, 399 S.E.2d 423 (1990).
- 2 Ky.—[Phillips v. Com.](#), 324 S.W.3d 741 (Ky. Ct. App. 2010).
- 3 Ky.—[Phillips v. Com.](#), 324 S.W.3d 741 (Ky. Ct. App. 2010).
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Ala.—[McLendon v. State Dept. of Revenue](#), 395 So. 2d 71 (Ala. Civ. App. 1980), writ denied, 395 So. 2d 73 (Ala. 1981).
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- 5 U.S.—[City of Pittsburgh v. Alco Parking Corp.](#), 417 U.S. 369, 94 S. Ct. 2291, 41 L. Ed. 2d 132 (1974).
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- 6 Ariz.—[Tanque Verde Enterprises v. City of Tucson](#), 142 Ariz. 536, 691 P.2d 302 (1984).
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- 7 Colo.—[Tom's Tavern, Inc. v. City of Boulder](#), 186 Colo. 321, 526 P.2d 1328 (1974).
- 8 Alaska—[Katmailand, Inc. v. Lake and Peninsula Borough](#), 904 P.2d 397 (Alaska 1995).
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Ark.—[Dicks v. Naff](#), 255 Ark. 357, 500 S.W.2d 350 (1973).
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- 9 13
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Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

4. Sales and Use Taxes

§ 2359. General standards applicable to sales and use taxes

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4145

The imposition of a sales or use tax is subject to constitutional due process constraints.

Due process constraints apply to the imposition of a sales tax¹ or a use tax.²

Due process requires that the statutes be sufficiently clear to provide fair warning and be understood without vagueness,³ that they rest on a rational basis,⁴ and that they employ a reasonable method of measuring tax liability⁵ and assessing and collecting taxes.⁶

State sales tax provisions do not violate substantive due process unless they are arbitrary or irrational,⁷ but an arbitrary and capricious application of a sales tax assessment provision that is otherwise sufficient on its face is nonetheless a due process infringement.⁸ A statute may provide that corporate officers are personally liable for unpaid sales taxes owed by the corporation under prescribed circumstances, without violating due process, provided the particular application of liability is fundamentally fair under the circumstances and not arbitrary, capricious, and unreasonable.⁹ The state may not, however, be consistent with due

process, pierce the protections offered by a limited liability business form to assess personal sales tax liability on a member for transactions by the business entity in the absence of determining grounds for piercing the veil.¹⁰

Due process prohibits the application of sales taxes in an impermissibly discriminatory manner,¹¹ but there is no due process violation on the basis that some areas of a sales tax district or some taxpayers in the district may receive a greater benefit from the taxes than others.¹² Higher resulting tax liability, based on a particular taxpayer's higher prices and greater sales, is not an unfair attribute of the tax system in violation of due process standards.¹³

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Footnotes

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Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014).
N.Y.—[Amazon.com, LLC v. New York State Dept. of Taxation and Finance](#), 81 A.D.3d 183, 913 N.Y.S.2d 129 (1st Dep't 2010), judgment aff'd, 20 N.Y.3d 586, 965 N.Y.S.2d 61, 987 N.E.2d 621 (2013), cert. denied, 134 S. Ct. 682, 187 L. Ed. 2d 549 (2013) and cert. denied, 134 S. Ct. 682 (2013).
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5 Kan.—[In re National Catastrophe Restoration, Inc.](#), 48 Kan. App. 2d 189, 291 P.3d 89 (2012).
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9 **Test of fundamental fairness**
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W. Va.—[Schmehl v. Helton](#), 222 W. Va. 98, 662 S.E.2d 697 (2008).
10 **Sales and use tax**
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La.—[Thomas v. Bridges](#), 144 So. 3d 1001 (La. 2014).
11 Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014).
12 **All establishments treated the same**
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13 **Explicit standards are required**
Wyo.—[Travelocity.com LP v. Wyoming Dept. of Revenue](#), 2014 WY 43, 329 P.3d 131 (Wyo. 2014).

12 Ga.—Board of Com’rs of Taylor County v. Cooper, 245 Ga. 251, 264 S.E.2d 193 (1980).

13 Ala.—*Cocina Superior, LLC v. Jefferson County Dept. of Revenue*, 138 So. 3d 313 (Ala. Civ. App. 2013),
cert. denied, (Aug. 16, 2013).

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16D C.J.S. Constitutional Law § 2360

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

O. Licenses and License Taxes; Sales and Use Taxes

4. Sales and Use Taxes

§ 2360. Required minimum contacts with taxing state

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4145

Due process requires that the imposition of a sales or use tax rest on a connection to the taxing state, expressed as a test for minimum contacts.

Due process recognizes the power of a state to impose liability on an out-of-state seller to collect a local use tax when the out-of-state seller is plainly accorded the protections and services of the taxing state.¹ When minimum contacts with the state or locality are present, the taxed party receives the benefits and protections of the laws of the state, and there is no due process problem with the state or locality extracting revenue from that party's transactions, but when minimum contacts with that state or locality are lacking, the state or locality offers no services or protections to justify the tax it receives, and the due process defects of such an imbalanced exchange do not disappear simply because the federal government brokers it.² In other words, there must be a sufficient nexus between the entity and the state to justify the imposition of the sales³ or use tax liability.⁴ Thus, the imposition of a tax assessment on sales of prepaid calling arrangements purchased over the internet by out-of-state customers from a company in the taxing state did not violate due process; traditional notions of fair play and substantial justice were not offended when the taxpayer's company was registered in the taxing state and had a mailing address there.⁵

A mail-order business does not need to have a physical presence in the taxing state in order to permit the state to require the business to collect a use tax from its in-state customers, consistent with the requirements of due process.⁶

A party may challenge use and excise taxes on due process grounds by showing clear and cogent evidence that the tax is out of proportion to the activity which takes place in the state.⁷ For purposes of compliance with due process, the auditing technique for the apportionment of state sales tax liability of an entity conducting business both within and outside a state can be achieved by a sampling if reasonably designed after consultation with the taxpayer to determine tax deficiency within the best judgment and information available to the taxing authority.⁸

CUMULATIVE SUPPLEMENT

Cases:

South Dakota statute requiring internet sellers with no physical presence in the state to collect and remit sales tax applied to activities with a substantial nexus with the State, as required to satisfy the Commerce Clause, where the statute applied only to sellers that delivered more than \$100,000 of goods or services into South Dakota or engaged in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis, a quantity of business that could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. [U.S.C.A. Const. Art. 1, § 8, cl. 3; SDCL § 10-64-2. South Dakota v. Wayfair, Inc.](#), 138 S. Ct. 2080 (2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Gordon v. Holder](#), 721 F.3d 638 (D.C. Cir. 2013).
- 2 U.S.—[Gordon v. Holder](#), 721 F.3d 638 (D.C. Cir. 2013).
Justified by protection, opportunities, benefits
Ill.—[Irwin Indus. Tool Co. v. Illinois Dept. of Revenue](#), 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).
In-state property or transaction
Colo.—[Leggett & Platt, Inc. v. Ostrom](#), 251 P.3d 1135 (Colo. App. 2010).
Nev.—[Great American Airways v. Nevada State Tax Com'n](#), 101 Nev. 422, 705 P.2d 654 (1985).
3 U.S.—[Standard Pressed Steel Co. v. Washington Dept. of Revenue](#), 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975).
Presumption from online solicitations
The statutory presumption in the sales tax law, that an online vendor is soliciting business in state, is rational and enacted in accordance with due process when annual certification methods permit retailers a fair opportunity to rebut the presumption.
N.Y.—[Overstock.com, Inc. v. New York State Dept. of Taxation and Finance](#), 20 N.Y.3d 586, 965 N.Y.S.2d 61, 987 N.E.2d 621 (2013), cert. denied, 134 S. Ct. 682, 187 L. Ed. 2d 549 (2013) and cert. denied, 134 S. Ct. 682 (2013).
4 U.S.—[National Geographic Soc. v. California Bd. of Equalization](#), 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977).
Ill.—[Irwin Indus. Tool Co. v. Illinois Dept. of Revenue](#), 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).
S.D.—[Matter of State Sales Tax or Use Tax Liability of Webber Furniture](#), Scottsbluff, Neb., 290 N.W.2d 865 (S.D. 1980).
Wash.—[State Dept. of Revenue v. J. C. Penney Co., Inc.](#), 96 Wash. 2d 38, 633 P.2d 870 (1981).

5 Fla.—[American Business USA Corp. v. Department of Revenue](#), 151 So. 3d 67 (Fla. 4th DCA 2014).

6 U.S.—[Quill Corp. v. North Dakota By and Through Heitkamp](#), 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed.
2d 91 (1992).

7 Miss.—[Tennessee Gas Pipeline Co. v. Marx](#), 594 So. 2d 615 (Miss. 1992).

8 Kan.—[In re National Catastrophe Restoration, Inc.](#), 48 Kan. App. 2d 189, 291 P.3d 89 (2012).

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16D C.J.S. Constitutional Law § 2361

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4. Sales and Use Taxes

§ 2361. Relief and remedies preventing or pertaining to deprivation; proceedings

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West's Key Number Digest

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The imposition of a sales or use tax is subject to constitutional due process requirements for meaningful deprivation safeguards and proceedings.

Proceedings relating to assessments under sales and use tax statutes must meet procedural due process standards.¹ In the context of tax assessments and collections, a meaningful opportunity to be heard, sufficient to satisfy due process, requires that a taxpayer be provided with either a predeprivation process or postdeprivation process to contest the validity of an imposed tax.² Thus, the State need not provide a remedy to contest a sales or use tax assessment before it is made,³ nor provide a hearing to a taxpayer prior to a contested payment,⁴ when the notice of assessment and right to appeal to the courts provide for due process.⁵ A taxpayer is afforded due process when availing a predeprivation remedy by appeal to a tax assessment board of review and subsequent appeal to the full tax commission, receiving a hearing before both bodies, and is not entitled to further judicial review without first paying the assessed tax or posting the required security bond.⁶

As required by due process, meaningful backward-looking relief operates to place a taxpayer who has suffered an unconstitutional deprivation in the same position as its competitors who were favored by a corresponding, but unlawful, tax exemption.⁷ A taxpayer is entitled to pursue what appears to be a clear and certain postdeprivation remedy regardless of other remedies, and due process thus may require a refund of a payment of unlawful local use taxes.⁸ A state may not deprive a taxpayer of its postdeprivation remedy, after a successful challenge to the imposition of the sales tax on one of its products but not the other, when the taxpayer reasonably relies on the apparent availability of a postpayment refund when it pays the tax, given the state's long-standing practice of permitting taxpayers to seek refunds for taxes paid under unconstitutional statutes.⁹

A statute of repose¹⁰ or time limitation on the right to seek a sales tax refund is not, in itself, a due process violation.¹¹

The state's authority to recover attorney's fees against a taxpayer based on the state's successful effort to recover sales taxes that the taxpayer paid under protest did not violate the due process requirement for an adequate taxpayer remedy for illegally paid taxes since the fees did not interfere with the taxpayer's right to remit taxes under protest and were awarded in connection with the taxpayer's ensuing suit.¹²

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Footnotes

1 Ill.—[American Welding Supply Co. v. Department of Revenue, State of Ill.](#), 106 Ill. App. 3d 93, 61 Ill. Dec. 920, 435 N.E.2d 761 (5th Dist. 1982).
Miss.—[Akins v. Mississippi Dept. of Revenue](#), 70 So. 3d 204 (Miss. 2011).
Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014).
N.D.—[Mann v. North Dakota Tax Com'r](#), 2007 ND 119, 736 N.W.2d 464 (N.D. 2007).

2 Miss.—[Akins v. Mississippi Dept. of Revenue](#), 70 So. 3d 204 (Miss. 2011).

3 Ohio—[Beatrice Foods Co., Inc. v. Lindley](#), 70 Ohio St. 2d 29, 24 Ohio Op. 3d 68, 434 N.E.2d 727 (1982).

Payment under protest and refund
La.—[Pontchartrain Materials Corp. v. Plaquemines Parish Government](#), 871 So. 2d 1171 (La. Ct. App. 4th Cir. 2004), writ denied, 882 So. 2d 607 (La. 2004) and writ denied, 882 So. 2d 606 (La. 2004).

4 Ga.—[Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon](#), 233 Ga. 507, 212 S.E.2d 341 (1975).

5 Ga.—[Richards v. Blackmon](#), 233 Ga. 739, 213 S.E.2d 638, 16 U.C.C. Rep. Serv. 1343 (1975).

6 Miss.—[Akins v. Mississippi Dept. of Revenue](#), 70 So. 3d 204 (Miss. 2011).

7 Nev.—[Sierra Pac. Power v. State Dep't of Tax.](#), 338 P.3d 1244, 130 Nev. Adv. Op. No. 93 (Nev. 2014).

Statutory refund process as meaningful relief
N.D.—[Mann v. North Dakota Tax Com'r](#), 2007 ND 119, 736 N.W.2d 464 (N.D. 2007).

8 Mo.—[North Supply Co. v. Director of Revenue](#), 29 S.W.3d 378 (Mo. 2000).

9 U.S.—[Newsweek, Inc. v. Florida Dept. of Revenue](#), 522 U.S. 442, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998).

10 Pa.—[DaimlerChrysler Corp. v. Com.](#), 885 A.2d 117 (Pa. Commw. Ct. 2005), order aff'd, 592 Pa. 612, 927 A.2d 201 (2007).

11 Wash.—[IGI Resources, Inc. v. City of Pasco](#), 180 Wash. App. 638, 325 P.3d 275 (Div. 3 2014).

Use tax
Ill.—[American Airlines, Inc. v. Department of Revenue](#), 402 Ill. App. 3d 579, 341 Ill. Dec. 769, 931 N.E.2d 666 (1st Dist. 2009).

12 La.—[Rent-A-Center East, Inc. v. Lincoln Parish Sales & Use Tax Com'n](#), 60 So. 3d 95 (La. Ct. App. 2d Cir. 2011), writ denied, 63 So. 3d 985 (La. 2011).